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Supreme Court of the United States

OCTOBER TERM 1969

No. 694

CARMINE PANICO and CARLIE DiPIETRO,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Carmine Panico and Carlie DiPietro, petitioners, jointly pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on June 25, 1969.

Opinions Below

The opinion of the Court of Appeals affirming the order of the District Court which denied a hearing on a motion for relief pursuant to 28 U.S.C. §2255—the matter here sought to be reviewed—is not yet reported; it is printed

in Appendix A, hereto, *infra*. The opinion of the District Court denying the §2255 motion is reported in 291 F. Supp. 728 and is printed in Appendix B hereto, *infra*.

(The opinion of the Court of Appeals affirming the Federal Narcotics convictions of the petitioners, the convictions to which the present §2255 proceedings are addressed, is reported as *United States* v. *Bentvena*, 319 F. 2d 916 (C. A. 2 1963), cert. denied 375 U. S. 940. Additional reported opinions of the Court of Appeals connected with the latter appeal proceedings in the original prosecution and conviction of the petitioners are referred to at appropriate places, *infra*.)

Jurisdiction

The judgment of the Court of Appeals affirming the denial of relief under 28 U.S.C. §2255 was entered on June 25, 1969 (Appendix C hereto, *infra*). By order of Mr. Justice Harlan the time for filing a petition for certiorari in this case has been extended to October 3, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. §§1254(a), 2101(a), and Rule 22(3) of the Rules of the Supreme Court of the United States.

Questions Presented

In petitioners' Federal narcotics conspiracy trial in 1962 a co-defendant, Salvatore Panico (brother of the present petitioner Carmine Panico), misbehaved before the jury so outrageously that psychiatric testimony was taken to determine whether he was competent to continue on trial. Salvatore was ruled competent and was then convicted (together with the present petitioners and several other defendants). Salvatore's own narcotics conviction was reversed by the Court of Appeals in June 1963 on a ground not here pertinent. At that same time the Court

of Appeals affirmed the convictions of the present petitioners (319 F. 2d 916). A few months thereafter (October 1963) this Court reversed Salvatore's separate conviction for contempt of Court during the narcotics trial, on the ground that he was or might be indicatedly insane —having been committed to a State prison mental hospital as a (New York) State-adjudicated schizophrenic almost immediately after his narcotics and contempt convictions (June 1962)—and had not been given a proper hearing on the sanity issues in the contempt case (*Panico* v. *United States*, 375 U. S. 29). Since several of Salvatore's co-defendants in the narcotics case had been contending all along that Salvatore's misbehavior before the jury had prejudiced the jury and had made it impossible for the co-defendants to have a fair trial, the last mentioned decision of this Court in October 1963 reversing Salvatore's contempt conviction after the Court of Appeals in June 1963 in the narcotics appeals had rejected the arguments concerning Salvatore's insane conduct, appeared to portend to Salvatore's co-defendants a good probability that this Court would grant certiorari to review the narcotics convictions as such (Oct. Term 1963). These hopes of the then certiorari petitioners in the narcotics case were dashed, however, when the then Solicitor General (Mr. Cox) filed a paper in this Court late in 1963 reporting that the State medical authorities who in June 1962 had diagnosed Salvatore as schizophrenic had "on fuller examination * * * concluded that schizophrenia was not a correct diagnosis; and that Panico was, on September 17, 1963, found suitable for return to prison".*

* The reason why Salvatore had come under the medical jurisdiction of New York State prison authorities immediately after his Federal narcotics conviction, was that he was also under a State sentence of imprisonment (for burglary) and had been returned to State custody after his Federal narcotics conviction.

The Solicitor General in that same paper also stated that he was lodging with this Court copies of the pertinent State prison medical records. What the Solicitor General did not tell this Court was that the latter medical records, in addition to revealing that the original diagnosis of schizophrenia was later revised, also revealed that the final diagnosis was one which indisputably rendered Salvatore incompetent to stand trial ("psychosis with psychopathic personality, depressed episode"). Thus the then Solicitor General in 1963 led this Court, and the then certiorari petitioners' counsel, to believe that the State medical people had finally concluded that Salvatore had never been a psychotic of any kind at all. The circumstances of the Solicitor General's lodging of the State prison medical records with the Clerk of this Court in 1963 were such as to have made it not reasonably likely for either the Justices or counsel to peruse closely those records. The practically inevitable—in view of the Solicitor General's above 1963 presentation—denial of certiorari in the narcotics case came within just a few days after the filing of the Solicitor General's paper referring to the State prison medical records (375 U. S. 940). Only later, after the denial of certiorari, did counsel learn the facts indicating that the then Solicitor General had apparently misinformed the Court and the opposing parties. As the imprisoned narcotics defendants, and the State-imprisoned Salvatore Panico, receded into the limbo of "incarcerated persons", and as those handicaps hampered counsel in further pursuing the indicated injustice of the 1963 Solicitor General's presentation to this Court, years elapsed, but finally in April 1968 this proceeding under 28 U.S.C. §2255 was commenced on behalf of the present petitioners, to obtain collateral review of the questions as to Salvatore's mental condition during the 1962 narcotics trial, and also to initiate judicial proceedings ad-

dressed to the Solicitor General's conduct in the 1963 certiorari matter. The questions are:

1. In the framework of this §2255 proceeding, does a cognizable issue arise out of the facts concerning the Government's evidently having misinformed this Court in the 1963 certiorari proceedings, as to the final New York State diagnosis of Salvatore Panico's mental condition?

2. If the subject matter of question 1, above, is not cognizable in this §2255 proceeding, should this Court now *sua sponte* grant re-hearing of the 1963 denial of certiorari on the ground of the Government's improper presentation at that time? (The present petitioners intend to file a petition for such re-hearing in the near future, with a motion for leave to file, relying on *United States* v. *Ohio Power Co.*, 353 U. S. 98, where re-hearing of the denial of certiorari was granted long after time had expired under the Rules.)

3. Where the insanity of one defendant in a mass conspiracy trial is in issue because that defendant's outrageous misbehavior during the trial is claimed to have made it impossible for co-defendants to have a fair jury trial, and where, in the direct review proceedings on petitions for certiorari before this Court, the Government led this Court to believe that the misbehaving defendant had finally been authoritatively diagnosed as never having suffered any form of psychosis at all during the trial, and where in fact those same medical authorities have concluded that the diagnosis was "psychosis with psychopatic personality, depressed episode"—which is universally acknowledged by the psychiatric profession as rendering a person incompetent to stand trial—and where all of the circumstances establish that neither the Justices of this Court nor the certiorari-petitioners' coun-

sel should have been reasonably expected to detect that the Government's description of the diagnosis was profoundly misleading in the 1963 certiorari proceedings, is it required by due process and by the standards of the decent administration of Federal criminal justice, that this Court should now review the case either by granting this petition for certiorari or by re-hearing the 1963 denial of certiorari, or both?

4. Was denial of a §2255 hearing justified by reason of the fact that at the trial and in the direct review proceedings the present petitioners litigated the same ultimate issue here presented, namely, whether Salvatore Panico's conduct made impossible a fair trial for the other defendants? Can such preclusion of this issue be justified now, in this §2255 proceeding, in light of our contentions (supported with substantial factual details in our §2255 moving papers) that the issues were not adequately explored in the trial and direct review proceedings and that significant new evidence has subsequently become available?

5. Was the denial, without a hearing, of the §2255 motion justified here under what appears to be the sole test laid down by §2255—i.e., was such denial justified on the theory that "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief" (28 U. S. C. §2255)?

6. Specifically, did both of the Courts below err in concluding without a hearing that the entirety of our new psychiatric evidence presented in our §2255 papers—including the affidavit of our distinguished and indeed nationally preeminent psychiatric consultant, Dr. Jay Katz of the Yale Medical School and Law School faculties—was merely "cumulative" and that "the probative value of the report [of Dr. Katz] is also questionable"?

7. Was it similarly erroneous for both of the Courts below to deny relief without referring at all in their respective opinions to the fact that Dr. Katz's affidavit pointed out that a definitive medical opinion cannot be reached without thorough study of voluminous prison medical records of Salvatore Panico which have thus far not been available and which can become available only through court-subpoena process which should have been but was not granted to us in this §2255 proceeding which has been summarily decided without a hearing?

8. Particularly with respect to the petitioner DiPietro, was it error to deny §2255 relief without a hearing in view of the fact that Salvatore Panico's misbehavior during the trial included shouted accusations (in the presence of the jury) that DiPietro was guilty of narcotics violations?

9. Particularly with respect to the petitioner Carmine Panico, was it error to deny §2255 relief without a hearing in view of the fact that the two Panico brothers throughout the trial were inseparably connected in the jurors' minds, so that Salvatore's outrageous behavior would especially prejudice the jurors against his brother Carmine Panico?

10. In view of repeated instances in which the Trial Judge adduced his own observations of Salvatore's conduct as a basis for concluding that Salvatore was acting deliberately rather than from uncontrollable psychological causes, was it error for that Judge to refuse to disqualify himself for all purposes in this §2255 proceeding as a "material witness" within the meaning of 28 U. S. C. §455?

11. Even if the case is not one of out-and-out psychosis on Salvatore Panico's part during the 1962 trial, but

if instead Salvatore was in the grip of emotional or psychological forces which he was unable to control, was it error to deny a §2255 hearing on this record, and are any of the above claims of error significantly less meritorious for the purposes of this proceeding—especially in view of Dr. Katz's conclusions that Salvatore was not "a malingerer or in any medical sense a 'faker' during any of his acts of misbehavior during the 1962 trial", he "was acting under emotional or psychological influences which he could not control" ("similar to behavior manifested by psychotic persons"), and that subject to study of the as yet unavailable prison hospital records it is "possible * * * that he could be classified as having been at those times in an out-and-out psychotic conditions"—to which is to be added that every one of the psychiatrists who examined Salvatore during the trial agreed that he was not malingering?

12. The sentencing judge having denied a §2255 hearing, and the Court of Appeals having affirmed, on what appear to be two main grounds or lines of reasoning—*viz.*, (a) on the ground that the §2255 papers and the record present no adequate §2255 fact issue as to whether the conduct of Salvatore Panico was the result of uncontrollable psychological forces but that on the contrary the record and the prior adjudications at trial and in the direct review proceedings establish that Salvatore's conduct was deliberate and indeed was part of a design of Salvatore and other defendants (including the present petitioners) to disrupt the trial; and (b) on the additional or alternative ground that even if Salvatore was in truth an uncontrollable maniac during the trial the present petitioners are not entitled to relief in any event because any such medical factor in the case is "irrelevant" to the ultimate issue of whether Salvatore's misconduct

prejudiced co-defendants in light of the adequate measures of the trial judge to avert jury prejudice and because this ultimate issue of jury prejudice has previously been adequately litigated and determined (in the trial and direct review proceedings) against petitioners' present contentions—are either or both of the aforesaid grounds or lines of reasoning reversibly erroneous; and, especially, can denial of §2255 relief without a hearing be justified once it is alternatively conceded (as the Courts below have *arguendo* conceded) that petitioners' contentions as to Salvatore Panico's medical condition may be taken as true, inasmuch as no such concession has ever previously been even remotely broached by any court or by the Government in this case, i.e., inasmuch as invariably heretofore the Government and the courts which have expressed themselves on the subject have negated the existence of any medically significant factor in Salvatore's misconduct during the trial?

13. Can this new *arguendo* concession by the Courts below that Salvatore Panico was a helplessly uncontrolled maniac during the trial, be reconciled with what still appears to be the main and essential thrust of those Courts' theory of the case, to wit, that Salvatore's misconduct was part and parcel of a concerted effort by all of the defendants to wreck the trial by creating intolerable disturbances and other disruption? Can it be true both that Salvatore Panico's violent conduct was psychologically uncontrollable and that the conduct was conspiratorially plotted? At the very least, if such a grotesque combination of circumstances could conceivably exist, is not a full evidentiary hearing required before one may reach so grotesque a conclusion, for it must be remembered that never before in this case (until announcement now of the *arguendo* concession by the

Courts below) had it been judicially posited that Salvatore Panico may concededly have been an uncontrollable maniac and that even if such were true it did not matter for the constitutional fairness of the trial as regards any other defendant?

14. In view of the granting of certiorari in *Turner* v. *United States,* no. 190, cert. granted June 2, 1969, we present also the question—not raised below—of whether the petitioners, in their 1962 narcotics trial, were denied due process of law and the privilege against self-incrimination by virtue of the provisions of 21 U. S. C. §174 as to a presumption of knowledge of importation of narcotics drugs (heroin) unless the defendant explains possession.

Constitutional and Statutory Provisions Involved

The case involves the due process and self-incrimination provisions of the Fifth Amendment of the United States Constitution. It also involves 28 U. S. C. §2255, 28 U. S. C. §455, and 21 U. S. C. §174. These statutory provisions are quoted in appendix G hereto, *infra.*

Statement of the Case*

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*We have requested the Clerk of the Court below to certify, for filing in this Court, a copy of our appendix on appeal. That appendix includes the entirety of the §2255 proceeding in the District Court except the briefs or memoranda of the parties. It will be more convenient in this petition to refer to pages of the latter appendix, rather than to the original record of the §2255 proceeding. Our said Court of Appeals appendix is paged as "A1a" *et seq.* Through a misunderstanding by our printer one item in the latter appendix does not have the above mentioned pagination. This latter item consists of a photocopy of a printed appendix which was filed in the Court of Appeals in

(*Footnote continued on following page*)

(*Footnote continued from preceding page*)

1962-1963 in docket no. 27733, which was the appeal from the original narcotics convictions in this case. This item, which in the instant Court of Appeals appendix is called Exhibit A annexed to the Affidavit of Counsel (Jerome Lewis) in the §2255 proceeding, should have been paginated in the appendix as pages A87a to A232a, but our printed did not do this, and instead he set forth this item in a form showing only the original printed pagination, which ran from 1a to 146a. The Court of Appeals accepted our appendix in that form.

For the Court's convenience, we shall here enumerate the papers, contained in the aforesaid appendix (and in the certified record herein), which were before the sentencing Judge in this §2255 proceeding:

The notice of motion for §2255 relief (and for disqualification of Judge MacMahon as a "material witness") (A2a) was supported by an affidavit of counsel (Jerome Lewis) (A7a to A86a) with exhibits annexed (the exhibits are described *infra*), an affidavit of a psychiatric consultant (Dr. Jay Katz of the Yale Medical School and Law School faculties—A207a to A217a, and printed as Appendix F, hereto, *infra*), and an affidavit by each of the within petitioners (affidavit of Carlie DiPietro—A218a to A225a; affidavit of Carmine Panico—A226a to A228a).

The exhibits annexed to the affidavit of counsel (Jerome Lewis) were *Exhibit A* (A86a) consisting of a printed "Appendix (Supplemental) On Behalf Of Appellant Carmine Panico and Salvatore Panico", having original printed page numbers 1a to 146a, this being the item mentioned *supra* as having been filed in the direct appeal in the Court of Appeals in 1962-1963, and as to which our within §2255 appeal appendix used the original pagination 1a to 146a—this Exhibit A contains, *inter alia,* all of the 1962 trial proceedings and related contemporaneous materials on Salvatore Panico's medical or psychiatric condition (see, on the second page following A86a of our appeal appendix herein, the index to said Exhibit A); *Exhibit B* (A89a) consisting of excerpts from contempt proceedings in the 1962 narcotics trial

(*Footnote continued on following page*)

Petitioners seek review of a judgment of the United States Court of Appeals for the Second Circuit which affirmed an order of the United States District for the Southern District of New York (MacMahon, D.J.) which denied without a hearing a joint motion by petitioners Carmine Panico and Carlie DiPietro for relief under 28 U. S. C. §2255 and for disqualification of the sentencing judge as a "material witness" pursuant to 28 U. S. C. §455. Judge MacMahon's opinion is printed in Appendix B, hereto, *infra;* the Court of Appeals' opinion is printed in Appendix A hereto, *infra.*

On July 10, 1962 each of the within petitioners was convicted in the United States District Court for the Southern District of New York, upon plea of not guilty and after a trial before a jury and Judge MacMahon, on a charge of conspiracy to violate the narcotics laws. Carmine Panico was sentenced to twelve years, and Carlie DiPietro was sentenced to twenty years. Petitioner Carlie DiPietro is serving his sentence at the Federal prison in Marion, Illinois. Petitioner Carmine Panico

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(*Footnote continued from preceding page*)

—these 1962 contempt procedings set forth in a convenient way the main portions of the trial proceedings showing Salvatore Panico's misbehavior, plus alleged contemporaneous conduct by each of the within petitioners; *Exhibit C* (A131a) consisting of relevant excerpts from the 1962 trial testimony; *Exhibit D* (A184a) consisting of certain New York State prison medical records of Salvatore Panico, of a short summary nature, which were obtained by the Government at the time of the proceedings on petitions for certiorari to review the narcotics convictions in 1963; and *Exhibit E* (A199a) consisting of correspondence between certain attorneys of the present petitioners and then Solicitor General Archibald Cox in 1965 relation to the last mentioned prison medical records.

was released from his imprisonment on September 19, 1969, under the "statutory good time" provisions, but he continues subject to a parole-type of supervision until completion of the full term of his twelve-year sentence, and he here submits that he is entitled to maintain this certiorari application (cf. *Jones* v. *Cunningham,* 371 U. S. 236).

The 1962 narcotics convictions were affirmed in *United States* v. *Bentvena,* 319 F. 2d 916 (C. A. 2, 1963), cert. denied 375 U. S. 940 (1963). However, the 1962 narcotics conviction of Salvatore Panico (petitioner Carmine Panico's brother) in that same trial was reversed by the Court of Appeals on a ground not here relevant (*id.,* 319 F. 2d 916).

Petitioners' central contention in this §2255 proceeding has been that they were denied a fair constitutional trial through being forced against their will to remain on trial with Salvatore Panico when the latter was engaging (and would predictably continue to engage) in conduct which he was helpless to avoid in a medical sense and which prejudicially diminished the chances of Carmine Panico and Carlie DiPietro for a fair jury consideration of their own respective cases (A9a-A13a, being the affidavit of Jerome Lewis in support of the §2255 motion).

And, since, as we well realized and as we readily acknowledged in the Courts below, this latter contention, *qua* contention, was identical to one which these same petitioners had urged in the proceedings for direct review of the 1962 narcotics conviction, it also became necessary for us in these §2255 proceedings in the Courts below, to address ourselves to the question of whether we are precluded from §2255 relief by this fact that the same contention was unsuccessfully made in the direct review proceedings.

The following is a summary of the contents of our §2255 papers in the District Court relating to the topics mentioned in our last two preceding paragraphs:

In the affidavit of Jerome Lewis in support of the §2255 motion there appears, at A17a to A57a, under the heading "The Psychiatric Condition Of Salvatore Panico", a detailed factual description of Salvatore's conduct during the trial, the steps taken by the trial Court in relation to Salvatore's conduct (i.e., steps to control Salvatore and to protect the rights of co-defendants), the motions and requests of other defendants occasioned by Salvatore's conduct, the facts as to two suicide attempts which Salvatore made at the West Street Detention Headquarters in New York City during the trial, and the psychiatric examinations of Salvatore which were made during the trial and as to which the Court conducted proceedings during the trial. Thus:

At A19a to A35a the Lewis affidavit traced in detail the 1962 pretrial and trial happenings which preceded Salvatore Panico's first major courtroom outburst, which took place May 23, 1962. On the latter day Salvatore suddenly charged into the jury box screaming wild language at the jurors and the Court (see especially A36a to A39a). This incident was accompanied by an outburst by the within petitioner Carmine Panico, at the sight of his brother Salvatore's conduct and the dragging of Salvatore from the courtroom by the Marshals as Salvatore still screamed and struggled (A36a). The trial judge's immediate reaction—in the presence of the jury—was that Salvatore's outburst was "a put up job" (*ibid*).

During the several weeks of pretrial and trial proceedings which antedated Salvatore's extraordinary outburst of May 23, 1962, there had been unusual conditions which understandably would produce emotional pressure and

tension in Salvatore, as the Panico brothers had been forced to trial without counsel of their own choice—and in these circumstances it had come about that the trial jury was selected without participation of counsel on behalf of the Panico defendants, there was no opening statement to the jury on their behalf, and the sole and the determinative prosecution witness against the Panicos (the accomplice witness Edward Lawton Smith) had not been cross-examined on behalf of the Panicos because when their own retained trial counsel (Alfred Arrone, Esq.) had finally become able to participate in the trial that attorney informed the Court that he was not in a position to cross-examine the latter Government witness, and no one cross-examined that witness on behalf of the Panicos (A19a to A35a).

In the aftermath (during the 1962 trial) of Salvatore's atrocious outburst of May 23, 1962 the trial Court continued to manifest his distrust towards the defendants with reference to Salvatore's outbursts, i.e., the trial Court made statements and rulings denoting that Salvatore's outburst was "planted", e.g., A37a, and see especially A39a describing an outburst by Salvatore two days later screaming that DiPietro, the within petitioner was "the convicted dope pusher", at which the Court denounced this outburst, in the presence of the jury, as a "put up job"; this was the second time Salvatore had thus accused DiPietro of narcotics activities, see A37a referring to an earlier such incident in the presence of the jury.

Two days after Salvatore's initial violent outburst and as his outrageous conduct continued, the trial Court had Salvatore examined by a psychiatrist, Dr. Vitold Arnett. Dr. Arnett's conclusions are reported at interior pages 20a to 31a of Exhibit A annexed to Mr. Lewis' Affidavit

(this Exhibit A follows A86a of our appeal appendix herein, as previously explained). Mr. Lewis' affidavit at A40a quoted from Dr. Arnett's report to the trial Court as follows*:

> "* * * Dr. Arnett stated, 'My conclusion is that he has developed a paranoid state with psychosis, and is not capable of undergoing a trial at this point" (*id.*, at p. 22a). Dr. Arnett added that the psychosis was "acute and temporary * * * if he is allowed a certain amount of rest and freedom from tension' (*id.*, at p. 25a), and that 'it is necessary to advise treatment here promptly in order to forestall a development which might lead to a chronic state' (*id.*, at p. 29a). Dr. Arnett also stated that Salvatore had 'described complaints of persecution * * * with various details, with emotional display and behavior, all of which we class as appropriate. By this I mean that there is not a discrepancy between the stated complaints and the tone or the emotion in which he states them. There are not those discrepancies which we look for as indicating invention of detail from moment to moment in an effort to back them' (*id.*, at p. 23a); and when asked by the Court whether 'the symptoms that you observed [are] consistent with faking', Dr. Arnett replied, 'They are not consistent with faking in the final decision I have made' (*id.*, at p. 29a)."

Notwithstanding the above quoted recommendation of the Court's own appointed psychiatrist, Dr. Arnett, that Salvatore be given "treatment * * * promptly in order to

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* The "*id.*" page references in the following quotation refer to the above mentioned Exhibit A to the Lewis affidavit.

forestall a development hich might lead to a chronic state", the Court did nothing until three days later, when on May 28, 1962 (a weekend having intervened) the Court had Salvatore taken to Bellevue for further examination (A40a to A41a). This examination at Bellevue was by three psychiatrists, the aforementioned Dr. Arnett, a Dr. Hyslop selected by the Court or the Government, and a Dr. Weiss engaged by the defense. The entirety of the stenographic minutes of the testimony of those three psychiatrists following the aforesaid examination appears in our appeal appendix herein as part of Exhibit A annexed to Mr. Lewis' affidavit; see following our appendix page A86a, the Exhibit A pages separately numbered 33a to 95a, being "Subdivision E" of said Exhibit A. We quote from the summary of the psychiatric testimony as given in the Lewis affidavit (A41a to A43a).*:

> "Dr. Hyslop had read Court Exhibits 139 and 140, which are Salvatore's medical record at the West Street jail (showing merely medication received, etc.) and he had also read the minutes of Dr. Arnett's testimony (*supra*) (5960). Dr. Hyslop had not made any physical examination of Salvatore (5964). The psychological examination was purely a question and answer one, no psychometric tests being made (5964, 5968). Dr. Hyslop's conclusions were that Salvatore was not malingering (5971) but that he was capable of understanding what the witnesses were saying, of discussing

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* In the above next ensuing quotation from the Lewis affidavit page numbers appear which refer to the 1962 trial minutes rather than to the Exhibit A pages where this psychiatric testimony also appears in our appeal appendix as above explained; these page references to the 1962 trial minutes also appear, however, in the Exhibit A item as contained in our appeal appendix.

the facts with his lawyer, was able to speak clearly and coherently and that his memory of events was clear (5968-5969). Dr. Hyslop admitted that Salvatore's functioning for purposes of being able to stand trial would be handicapped during the times of his outbursts (5989); and when asked whether he would be similarly handicapped for some period of time preceding such outbursts, Dr. Hyslop replied 'Nobody could tell you that' (5989-5990). Dr. Hyslop had spent about one and one-half hours with Salvatore on the first day of the examination, and less than one-half hour on the second day (5995). Dr. Hyslop admitted that the fact of Salvatore's having had a more restful and relaxed environment between the preceding Friday (May 25) and the time of the examination (May 28 and 29) could have been instrumental in bringing about an improvement in his mental condition (5992-5993).

"Dr. Arnett testified that Salvatore was now capable of understanding the nature of the charge, to discuss the facts with his lawyer, to speak coherently, to understand what the witnesses were saying, and that his memory of events was clear (5998-5999). Salvatore no longer had the paranoid delusions displayed at the time of the prior examination by Dr. Arnett (5999-6000). He was not malingering (6002). Dr. Arnett repeated that at the time of his first examination Salvatore was not capable of standing trial (6003-6004). Especially significant was Dr. Arnett's statement that Salvatore's condition was the result of a tension buildup (6008-6009), and that continued tension would be bad for him (6009-6010). He described Salvatore's paranoid delusions at the time of the first examina-

tion (6010-6011). He admitted that Salvatore still had fears of physical violence being perpetrated against him (6011-6013). Also, Dr. Arnett admitted that Salvatore's condition could recur although he was 'reasonably certain' that this would not happen (6017-6019). The Court precluded the defense from asking Dr. Arnett the obviously most important question, namely, 'Wouldn't it be preferable that this man continue to have some type of rest from this trial and continue to have some type of treatment to insure that such an episode should not occur during this trial' (6018-6019).

"Dr. Weiss, the psychiatrist engaged by the defense,* had been senior psychiatrist of the prison ward at Bellevue since 1940 (6021). He pronounced Salvatore to be suffering from 'psychosis of a paranoid condition' and to be not capable of standing trial, i.e., 'He does not comprehend [the proceedings] fully', and that he was not able to 'properly assist counsel in his own defense' (6026-6028). Dr. Weiss also stated that Salvatore's symptoms of persecution were 'not malingered' and were 'delusional and that he has intermittently had halucinations. He still has this attitude. He had no insight into it.' (6026-6027). When asked whether he could state 'with reasonable certainty that such episodes [the violent courtroom outbursts] would not happen again during the progress of this trial if the defendant is directed to proceed to the termination of this trial', Dr. Weiss replied, 'I feel reasonably

* In preparing for this §2255 effort we engaged Dr. Weiss as a consultant (in 1966), but he died a day or two after we retained him (A77a).

it could happen again * * * he is not malingering * * *' (6033)."*

At the conclusion of the above described psychiatric testimony of May 29, 1962 the trial Court ruled that Salvatore had ability to stand trial; defense motions for mistrial, severance and a further and more extended examination and treatment at Bellevue were denied (A44a to A45a).

The next trial happenings may be divided for present purposes into two stages, namely, the period from May 29 to June 7-8, 1962, on each of which latter days Salvatore made a suicide attempt; and the period from June 7-8 to June 18-19, 1962 when a further psychiatric examination was made by the Court psychiatrist Dr. Hyslop.

The Lewis affidavit describes in detail at A45a to A51a how, from May 29 through June 6, Salvatore continued to have outbursts in Court, how his brother, symbiotically reacted to these disturbances,** how various defense counsel kept trying to obtain from the Court protection for the rights of other defendants in the face of Salvatore's continuing misbehavior, and how the trial Court

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* It will be noted that all three psychiatrists agreed Salvatore was not malingering.

** The Court below incorrectly states (Appendix A hereto, *infra*, p. 3a) that Carmine Panico (and Carlie DiPietro were convicted of contempt in the prior trial of the same indictment before Judge Levet. Both of these petitioners behaved perfectly in that first trial. And see *infra* as to their behavior in the instant second trial; both of the Courts below have exaggerated the seriousness of that behavior and by these exaggerations they have spun a fallacious theory that the petitioners themselves offended the jury irrespective of Salvatore's conduct.

kept manifesting its firm belief that Salvatore was faking and that the whole thing was a plot by defendants to wreck the trial.

At A51a to A52a the Lewis affidavit describes Salvatore's respective suicide attempts on June 7 and June 8.*

At A53a to A54a the Lewis affidavit describes Salvatore's continuing abnormal behavior in the courtroom after the two suicide attempts and up to June 18, 1962, on which latter date the renewed examination by Dr. Hyslop was ordered.** We quote from the Lewis affidavit concerning this renewed examination by Dr. Hyslop (A52a to A53a):

> "After these two suicide attempts the Court of Appeals on June 18, 1962 granted a mandamus against Judge MacMahon—who had refused all defense requests for a further psychiatric examination after the suicide attempts (7221, 7223, 7430-7432, 7740, 7840)—to hold a further hearing on Salvatore's mental competency to continue to stand trial (8140-8106). This examination was conducted June 18 by Dr. Hyslop (8192-8196). The full minutes relating to this examination are in Exhibit A *infra*, 'Subdivision H', and the trial Judge's findings are in *id.*, 'Subdivision I.'
>
> "Dr. Hyslop's examination was for all practical purposes a nullity, Judge MacMahon finding that Salvatore 'refused to cooperate' (Exhibit A *infra*,

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* Both of the Courts below minimize these suicide attempts. We ask this Court to read A51a-A52a and the trial record materials there cited.

** After a mandamus from the Court of Appeals.

at p. 139a); and the conclusions of the 'examination' were stated by Dr. Hyslop in a manner which scarcely suggests an attitude of confident medical certainty. This 'examination' occurred in the following manner: At 9:20 P.M., Salvatore was taken from his cell in the courthouse to be examined by Dr. Hyslop in another part of the courthouse. He was returned to his cell at 9:55 P.M. At most this examination by Dr. Hyslop consumed one-half hour. Salvatore complained of a severe headache and the examination was adjourned to the following day during lunch hour. This adjourned examination was not had because Dr. Hyslop was in fear of his safety. The trial Court had prepared several questions for Dr. Hyslop to answer. Three of these questions were: whether Salvatore could confer with counsel for the preparation of his defense; whether he knew the nature and quality of his acts; whether he could distinguish between right and wrong. To the first question Dr. Hyslop stated he could not answer. As to the other two questions he could not state. Nevertheless, one day later, without the benefit of any additional examinations, Dr. Hyslop submitted to the Court a more detailed report and completely changed the answers he had previously given. We respectfully suggest that a reading of Dr. Hyslop's report conveys, even to the non-medical mind, a distinct impression of superficiality, strained interpretation of facts, and lack of confidence by the learned physician himself in his own conclusions. Overruling defense objections and requests that Dr. Hyslop's 'examination' and report needed to be supplemented by further psychiatric testimony by physicians free of prior predilection,

Judge MacMahon again found Salvatore competent and denied severance. See Exhibit A *infra*, 'Subdivisions H' and 'I'.

"Judge MacMahon had also referred Dr. Hyslop to certain portions of the trial record for the purposes of the June 18 examination (Exhibit A, *infra*, at p. 118a). Dr. Hyslop was able to state in his report that 'Between June 9 and June 17 there was no unusual behavior' (*id.* at p. 127a). It therefore becomes of interest to examine the record for the dates following Salvatore's suicide attempts of June 7 and June 8.

"It is beyond dispute that after these suicide attempts (June 7 and 8, 1962) Salvatore continued his abnormal behavior in the courtroom, with repeated outbursts, refusal to communicate with his attorney, etc. (e.g., 6995, 7051-7052, 7059-7060, 7065, 7070, 7117, 7251, 7269-7270, 7735-7736, 7816-7817, 7896, 7962, 8117, 8123, 8187) (referring to incidents from June 7 to June 18)."

The day after this last report by Dr. Hyslop the trial proceeded to the summations (June 20); as the case went to the jury shortly thereafter there were no further untoward happenings, as Salvatore was being kept in confinement, and the jury verdict of conviction was rendered June 26, 1962 (A54a). That same day the Court sentenced several of the defendants, including Salvatore and the two present petitioners, for contempt of Court (*ibid.*). On the same day and again on July 9, 1962 the Court refused defense requests for a further psychological examination of Salvatore; the next day (July 10) Salvatore was sentenced to 20 years on the indictment charge, and in the Court's opinion denying bail on a blanket basis

for all defendants he referred to "fake suicides" and "faked insanity" (*ibid.*).

At this point it is pertinent to go back a little in the chronology. After Salvatore's suicide attempts of June 7 and 8, 1962, a letter opinion was obtained by the defense from Dr. Weiss, the defense psychiatrist above mentioned. This letter, dated June 14, 1962 is quoted in our Court of Appeals appendix herein in the Exhibit A item which follows A86a, the interior pagination for this item in Exhibit A being 108a to 109a. We quote from the Lewis affidavit herein (A56a to A57a):

> "* * * The letter, referring to Salvatore's conduct (including the suicide attempts) subsequent to Dr. Weiss's examination of Salvatore on May 29, 1962, states that 'In view of his conduct, and the increasing tension he has been under in the courtroom since my examination, I feel definitely that the psychosis is severe and deepening in character'. This letter of Dr. Weiss was among the papers presented to the Court of Appeals in the mandamus application.
>
> Dr. Weiss' letter above referred to turned out to be all too prophetic. Salvatore Panico, who was sentenced as a supposedly sane person on July 10, 1962, was diagnosed *just two days later* by the psychiatrist at Sing Sing Prison as a schizophrenic. See Exhibit A *infra*, 'Subdivision J'. Subsequently, on August 22, 1962, Salvatore was committed to the Dannemora State Hospital for the Criminally Insane by order of the County Judge of Westchester County as a schizophrenic, such having been found upon examination by two State-appointed psychiatrists who thus confirmed the di-

agnosis of the Sing Sing Prison psychiatrist made July 12, 1962 (*ibid.*)."*

The Lewis affidavit also brings out that on July 19, 1962, Mr. Lewis was told by the Sing Sing Prison psychiatrist, Dr. Bruckman, "That Panico was schizophrenic; that he agreed with the diagnosis of Dr. Weiss; that he had recommended that Panico be transferred to Dannemora; which is the mental institution for the criminally insane" (A64a; and in the Exhibit A item which follows A86a see the interior page 141a). The official text of Dr. Bruckman's findings appears at A190a, and in Appendix D hereto, *infra,* p. 63a.

After Salvatore was committed to Dannemora as an insane person as aforesaid in August 1962 he remained there for more than a year under psychiatric treatment and observation. Under circumstances of which we shall speak *infra* in another connection, the Government obtained, late in 1963, a copy of the "Dannemora State Hospital Clinical Summary" concerning Salvatore. This item is quoted in our appeal appendix herein at A185a to A188a and in Appendix D hereto, *infra,* pp. 54a-61a. Our present psychiatric consultant, Dr. Jay Katz, takes the position (Appendix F hereto, *infra,* pp. 90a, 93a) that it is indispensable to a definitive medical evaluation of this Dannemora Clinical Summary to study also the entirety of the day-to-day Dannemora Hospital records

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* For the text of the official New York State documentation concerning this commitment to Dannemora, and the Sing Sing diagnosis, see A190a-A197a and Appendix D hereto, *infra,* at pp. 63a-75a. (The latter documents do not contain the day-to-day prison medical records which, as indicated *infra,* our psychiatric consultant Dr. Jay Katz wishes to study, along with the subsequent Dannemora day-to-day records.)

over the period of more than year that Salvatore was in that institution; these latter records have remained unavailable down to the present moment, and they are obtainable only by court-subpoena process, which we requested and were refused by the Courts below in this §2255 proceeding. Nevertheless, the Dannemora Clinical Summary set forth in Appendix D hereto, *infra*, at pp. 54a-61a is revealing of medically *significant facts which* have not thus far been appreciated by the Government or by the Courts below. Since we are sure that this Court will wish to examine for itself the exact text of the Clinical Summary, we shall here call attention only to certain items in that document which we think deserve special emphasis:*

At A186a,** under date of August 29, 1962, which was one week after Salvatore was admitted to Dannemora

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* In now coming to the topic of this Dannemora Clinical Summary which the Government "lodged" in this Court near the end of the 1963 certiorari proceedings, we must immediately emphasize that, until that "lodging" by the Government, no Judge or Court in this case (or anyone else, of defense counsel or among the defendants in the 1962 narcotics trial) had any knowledge of even the existence of such a medical document. We are emphasizing this because, as more fully explained *infra*, both of the Courts below in this §2255 proceeding inexplicably seem to be under the wholly erroneous impression that this medical document was known to the Court of Appeals during the direct review proceedings in the 1962 prosecution—and because the Government's "lodging" of the document in this Court occurred under circumstances compelling the gravest concern as to whether this Court itself ever really knew what was in the document (as distinct from knowing what the Solicitor General *said* was in the document) before it denied certiorari in December 1963 in the direct review proceedings.

** Again, the Dannemora Clinical Summary is printed in full at pp. 54a-61a in our appendices hereto, *infra*.

(see A185a), the Clinical Summary reported that the patient "is depressed, crying, despondent, over the fact that 'the fellows at the trial are out to get me here, too'. He has not eaten because the food is poisoned, 'they' put needles and bamboo sticks in his food. On the wall he saw God's face." The same entry in the Clinical Summary further stated (A186a) that the patient was "placed in a restraint sheet* because of his suicidal tendencies", and went on to describe further his depressed and uncooperative condition and his fear of eating poisoned food.

In a further entry in the Dannemora Clinical Summary which is undated but would appear to have been made after January 22, 1963 and before March 25, 1963 (A186a), it was reported that Salvatore had been showing "progressive improvement under tranquilize medication" and that "he is very anxious to go back to the prison".

Then, in an entry in the Clinical Summary dated March 25, 1963 it is again reported that Salvatore was doing well, was "free of overt psychotic trends", and "is very anxious to go back to the prison" (A186a).

It further appears from the Clinical Summary that it had been planned to present Salvatore to the Dannemora Staff with recommendation for return to a regular prison on April 9, 1963, but that this presentation had to be postponed until around mid-September 1963 because he had become "nervous, tense and sleepless" when he was informed in April 1963 that his daughter had to have a major operation; he had then been placed on thorazine treatment until July 5, 1963, although on June 2, 1963 he

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* *I.e.*, a "strait-jacket" to prevent Salvatore from further suicide attempts *at Dannemora*—which means that the trained psychiatric personnel at that institution, in August 1962, did not think Salvatore was "faking" suicide.

was found to have recovered from the latter episode (A186a to A187a).

Under date of September 13, 1963 the above developments post-dating March 25, 1963 were reported in the Clinical Summary, with the further findings that "he maintains his improvement being free of overt psychotic trends and he asks again to be presented to the Staff"; this entry of *September 13, 1963 then further* states, "His diagnosis is schizophrenia, paranoid type (A187a).

Finally, in an entry in the Clinical Summary dated September 17 and September 26, 1963 it is stated that "His admission to Dannemora was caused by development of depressive reaction with suicidal attempt. He has paranoid ideas with undue suspiciousness" (A18a); the report then continues, describing Salvatore's improvement, and concludes as follows (A188a):

> "* * * He is in good contact, he shows no evidence of any symptoms suggesting Schizophrenia which was the original impression. Today at Staff his ward physician as well as the Staff and psychologists, whom he had in group therapy and recently gave psychological test, which failed to reveal any evidence of Schizophrenia, expressed the idea that the patient has Psychopathic Personality and has not seen any evidence of Schizophrenia. Accordingly, the patient's diagnosis is changed from Schizophrenia, Paranoid to Psychosis with Psycopathic Personality, Depressed Episode. The patient has recovered and is found suitable to return to prison.
>
> DIAGNOSIS: PSYCHOSIS WITH PSYCHOPATHIC PERSONALITY, DEPRESSED EPISODE
>
> CONDITION: RECOVERED FROM PSYCHOSIS

RECOMMENDATION: RETURN TO GREEN HAVEN PRISON

DATE: SEPTEMBER 26, 1963"

(illegible signature)
IZAAK GORLICKI, MD
Assistant Director"

It thus appears, on the face of the above described Dannemora Clinical Summary, that as of a time about 14 months after Salvatore had originally been diagnosed as schizophrenic, the Dannemora staff diagnosed *psychosis* termed by them "psychosis with psychopathic personality, depressed episode", from which Salvatore was found to have recovered as of September 17-26, 1963. (*The Lewis affidavit notes the universal acceptance among American psychiatristss that the term "psychosis with psychopathic personality, depressed episode" raises a presumption that a person so diagnosed would be incompetent to stand trial on criminal charges* (A80a to A81a).)

After the final diagnosis at Dannemora in September 1963, Salvatore remained in a New York State Prison for some further time, being released late in 1966.*

Shortly thereafter, in December 1966-January 1967, our psychiatric consultant, Dr. Jay Katz, examined Salvatore, and a trained psychiatric colleague of Dr. Katz put Salvatore through intensive psychological tests. Dr. Katz is professor of Law and Psychiatry at the Yale University Law School and Medical School; his colleague who did the psychological testing in this case is Dr. Ernst Prelinger, Associate Professor of Psychiatry at Yale University (A208a, A209a). Dr. Prelinger's testing of Salvatore

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* This State imprisonment was for an offense not connected with the instant federal narcotics case, as earlier mentioned.

took place on two separate days, for a total of twelve hours. Dr. Katz states in his affidavit herein (A207a *et seq.*, and quoted in Appendix F hereto, *infra*, pp. 89a-90a) that "Dr. Prelinger's reports and work notes were submitted by him to me, and he and I thoroughly discussed his procedures, results and finding" (A212a). Dr. Katz held psychiatric interviews with Salvatore on December 20, 1966, 1½ hours, preceding Dr. Prelinger's first day of tests with Salvatore; and a second interview on January 4, 1967, two hours, following the completion of Dr. Prelinger's testing, which had been completed December 29 (A212a). Dr. Katz also read extensive relevant portions of the trial and appellate records in the narcotics and contempt cases (A210a to A211a), including the above described Dannemora Clinical Summary (A211a).* Since we print in Appendix F hereto, *infra*, the entire text of

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* We mention these details of the time and thoroughness devoted to this case by Dr. Katz and Dr. Prelinger, because both of the Courts below have disparaged the "probativeness" of Dr. Katz's findings on the ground that not enough time went into the examination of Salvatore Panico. Especially hard to understand is the ill-concealed slur of the Court below in referring to this noted physician as "a Dr. Jay Katz" (Appendix A hereto *infra*, p. 9a). For facts indicating that Professor Jay Katz of the Yale Medical School and Yale Law School is regarded throughout this country as "the top man" among psychiatric criminologists, see the Jerome Lewis affidavit in our appeal appendix herein at A77a-A78a. We (counsel herein) respectfully want this Court to know that, in view of the exceptionally delicate problems of "policy" and "diplomacy" in this case—where we are obliged to attack the propriety of the conduct of a former Solicitor General of the United States—we were determined that, for this §2255 effort, we were simply going to get the very best psychiatric consultant in the United States, the most capable man and the man of most unimpeachable integrity in this field, and we are sure that in Dr. Jay Katz we have that man.

Dr. Katz's affidavit submitted in this §2255 proceeding (A212a-A217a), we shall here only summarize:— Dr. Katz emphasized that Salvatore Panico had not malingered during the 1962 trial; that he had been in the grip of uncontrollable psychological forces; that these could well have been of an "out and out" psychotic nature or akin to psychosis but that thorough examination of the day-to-day Dannemora clinical records would be necessary for Dr. Katz to be sure about a diagnosis of "psychosis"; that Salvatore had been "honest in what he revealed" to Dr. Katz and Dr. Prelinger; that "it was to be expected" that Salvatore's pattern of outbursts at the trial would continue and "that these would be outbursts not faked by him"; and "that the Trial Judge's inter-action with Mr. Panico during the trial made Mr. Panico see the Trial Judge as a real enemy, and that this further contributed to the paranoid outbursts of Mr. Panico in the courtroom. The Court was so convinced that Mr. Panico was a malingerer—when in my opinion he was not malingering—that Mr. Panico saw this attitude of the Court as further evidence that the Court was 'against him' and trying to 'defeat his just rights', and indeed he believed that the Court was trying to 'destroy' him." In short, Dr. Katz concluded that Salvatore was medically helpless to control himself from behaving in the outrageous manner of an insane person during the 1962 trial, and that the question of actual clinical insanity at that time must be regarded as open, requiring for its final decision a thorough examination of the Dannemora records—which can only be made available through Court procedures such as those of the §2255 procedure.

The foregoing concludes our description of the data presented in our §2255 papers on the subject of Salvatore Panico's psychological condition.

We also presented in our §2255 papers a detailed history of all prior review proceedings in this case in connection with both the direct review of the narcotics convictions and the direct review of the contempt conviction of Salvatore (A58a to A79a), with a view to showing that the present §2255 issues are not precluded; there have been no collateral review proceedings on behalf of either of the petitioners Carmine Panico and Carlie DiPietro or on behalf of Salvatore Panico.*

(The issue of whether we are foreclosed by prior proceedings from raising in §2255 proceedings the contention that Carmine Panico and Carlie DiPietro were denied a fair trial by reason of Salvatore Panico's trial conduct, was deemed by the Courts below to be settled against us owing to the circumstance (which we concede) that this same contention was litigated in the direct review proceedings from the narcotics conviction. However, we suggest later in this Statement and in our "Reasons" *infra* that basic constitutional fairness requires exercise of the §2255 review power here because the prior litigation and determination of the issue were procedurally and factually inadequate by constitutional standards.)

The Lewis affidavit also treats in detail the question of specific prejudice to each of the within petitioners, caused by Salvatore's misconduct at the 1962 trial. As to Carmine Panico, see the Lewis affidavit *passim* at A19a to A55a, where the expectional brotherly closeness of Carmine and Salvatore and the numerous trial incidents are described which must inevitably have caused the jury to be prejudiced against Carmine owing to his brother's atro-

* In the case of Salvatore both the narcotics and contempt convictions were reversed. The Government has never re-tried Salvatore in either of those cases.

cious misbehavior. As to the specific prejudice to Carlie DiPietro, see, aside from the overall description *supra* of the items in the Lewis affidavit which depict the 1962 trial scene as inevitably resulting in prejudice to all of the defendants by reason of Salvatore's conduct, the specific incidents in which Salvatore shouted accusations of narcotics violation and even prior conviction against DiPietro (*supra*); and see A84a and A218a *et seq.* where it is shown that as a matter of law DiPietro was not a "convicted" narcotics violator.

As to the perhaps most single important aspect of the present controversy, the aspect of the Solicitor General's incorrect presentation to this Court, during the 1963 direct review proceedings in the narcotics prosecution, concerning the Dannemora medical records, our §2255 papers contained the following:—

First, we endeavored in those papers to convey the chronological perspective or the appellate-history setting in which the real impact of the Solicitor General's action is to be understood. Here are the main operative time sequences: Salvatore Panico's misconduct in the courtroom took place in *May-July 1962,* and on *July 10, 1962* he was sentenced both for contempt and for narcotics conspiracy, as a sane person. *On July 12, 1962* Salvatore was found insane by New York State prison psychiatrists, and upon New York State judicial confirmation of this finding, Salvatore was committed to the prison mental hospital at Dannemora in *August 1962,* where he was apparently immediately strait-jacketed to restrain him from insane suicide. About seven months later, after treatment at Dannamora, Salvatore apparently showed great improvement *(March 1963).* Meanwhile, in *September 1962* the Court of Appeals had affirmed Salvatore's contempt conviction, with Judge Friendly dissent-

ing on the ground that the insanity issue had not been adequately determined in the summary contempt forum; the Court of Appeals in the latter contempt appeal had before it the correspondence of *July-August 1962* from Mr. Lewis reporting that the New York State authorities had found Salvatore insane and had committed him to Dannemora (*United States* v. *Panico,* 308 F. 2d 125 (C. A. 2, 1962), reversed 375 U. S. 29). Meanwhile also the appeals from the *July 1962* narcotics conviction were being carried forward, and in *November-December 1962* briefs of the various appellants called the Court of Appeals' attention anew to the medical facts of *July-August 1962* concerning Salvatore. The latter appeals were orally argued in *January 1963.* In *June 1963* the Court of Appeals affirmed the narcotics convictions (except as to Salvatore and three other appellants on various grounds not here pertinent), and in doing so it rejected the appellants' arguments about Salvatore's mental condition and its prejudicial impact on co-defendants; it is evident that in rejecting these arguments the Court of Appeals was simply abiding by its earlier ruling to the same equivalent effect in its decision of *September 1962 (supra)* affirming Salvatore's contempt conviction; see *United States* v. *Bentvena,* 319 F. 2d 916, at 931-932 (C. A. 2, 1963), cert. denied 375 U. S. 940. Meanwhile—the chronology has now brought us to *June 1963*—no one in this case, of Court or counsel, apparently had any information about what was going on with Salvatore at Dannemora since he was committed to that institution in *August 1962.* (We therefore again emphasize that the Court of Appeals, neither in its *September 1962* affirmance of Salvatore's contempt conviction nor in its *June 1963* affirmance of the narcotics convictions, had before it any information post-dating *August 1962* concerning Salvatore's medical condition at Dannemora, where he was to continue com-

mitted as a mental patient until near the *end of 1963.*) Meanwhile also, the certiorari proceedings to review Salvatore's contempt conviction were being perfected in this Court, and the next significant step in the chronology is that in *October 1963* this Court, *per curiam,* reversed the contempt conviction, noting that there had been no fair judicial determination in the contempt proceeding of the issue of Salvatore's sanity, that the expert medical testimony during the narcotics trial as such had been "conflicting", and that the New York State psychiatrists had found Salvatore insane and committed him to a prison mental hospital shortly after the contempt conviction (of *July 1962*) (*Panico* v. *United States,* 375 U. S. 29, 30). With this reversal, in *October 1963,* of Salvatore's contempt conviction, our next chronological attention focuses on the certiorari proceedings to review the narcotics convictions. Those certiorari proceedings were being perfected by the various petitioners before this Court during the *Autumn of 1963.* When in *October 1963,* then, this Court reversed Salvatore's contempt conviction on grounds relating to his mental condition *(supra);* the certiorari petitioners in the narcotics case naturally anticipated that there would now be a serious possibility indeed that this Court might grant certiorari in the narcotics case in view of the then posture of the record concerning Salvatore's mental condition. It was at this juncture that the Solicitor General produced his bombshell, the Dannemora Clinical Summary according to which, the Solicitor General told this Court, or plainly implied to this Court, Salvatore had never been a psychotic at all and the original diagnosis of schizophrenia had been found incorrect. Within a few days after this bombshell, the Court denied certiorari to all of the petitioners in the narcotics case (375 U. S. 940 (*December 1963*)). Let us now note the further details of just what

the Solicitor General did in the aforementioned juncture *late in 1963*, and why what he did was incorrect and unjust.

The Lewis affidavit in this §2255 proceeding (A69a to A76a) shows that in a Brief In Opposition filed by the Solictor General very late in the 1963 certiorari proceedings, in the case of a separate certiorari petitioner (Anthony Mirra), the Solicitor General stated that he was lodging with the Clerk of the Supreme Court copies of certain Dannemora Clinical Summaries concerning Salvatore Panico, and the Solicitor General stated in the aforementioned Brief In Opposition that:

> "* * * the diagnosis of schizophrenia was tentative; that, on fuller examination, the New York authorities have concluded that schizophrenia was not a correct diagnosis; and that Panico was, on September 17, 1963, found suitable for return to prison."

The Lewis affidavit further avers (A69a to A76a) that when we—who were at that time certiorari counsel for Carmine Panico—saw this presentation of the Solicitor General in 1963 it did not at first occur to us to question the accuracy of that distinguished officer (Hon. Archibald Cox), and we therefore at first did not inquire at the Office of the Clerk of the Supreme Court as to the contents of the Dannemora Clinical Summaries which the Solicitor General told the Court he had lodged with the Clerk and whose contents he described as above quoted.

The Lewis affidavit further avers (*ibid*) that later in December, 1963—soon after the above mentioned denial of certiorari in the narcotics case—Mr. Glasser (of present counsel herein) began to wonder whether we had done right in accepting the Solicitor General's *description* of the Dannemora Clinical Summary, and whether we ought

still not to try to check up on the actual contents of that medical documents which the Solicitor General had lodged with this Court. Late in the afternoon of December 24, 1963—Christmas Eve—Mr. Glasser telephoned the office of the Clerk of this Court, and as it was the Holiday eve, the telephone was answered by Hon. John F. Davis himself. Mr. Glasser asked about the documents which the Solicitor General had lodged, Mr. Davis said he would get them and call back, Mr. Davis then did call back Mr. Glasser saying that the documents had already been taken back by the Department of Justice and that this was improper and that Mr. Davis was immediately having the documents returned to his office by the Department of Justice and would phone Mr. Glasser back again. A little later that same afternoon Mr. Davis telephoned Mr. Glasser and said that the documents which he had just got back from the Department of Justice were *"illegible"* (Mr. Davis' word) copies. Mr. Glasser then asked Mr. Davis how the Justices could read these papers if they were illegible, and Mr. Davis said he did not know. Mr. Glasser then asked Mr. Davis to please engage at our expense the most capable possible document decipherer and transcriber, and to try to supply us with a more legible transliteration of the documents, which Mr. Davis kindly consented to try to do. About ten days later we received from Mr. Davis copies of the documents, certified by him, which were perfectly clear and legible copies of the documents in an apparently facsimile form. To this time we have never asked Mr. Davis, and we do not know, how these perfectly legible facsimiles became available when a few days earlier Mr. Davis told Mr. Glasser he (Mr. Davis) was holding in his hand illegible copies. That is, we have no knowledge of how it came about that the Department of Justice supplied Mr. Davis with perfectly legible copies after they had previously supplied him with

illegible ones—*needless to say, there is no criticism in any of this concerning Mr. Davis.* (Until we instituted this §2255 proceeding in April 1968 we had been unable, owing to many circumstances involving our incarcerated clients, to open for judicial inquiry this whole question of the mystery of the legible *versus* the illegible documents.

When we did get from Mr. Davis the legible copies (early January 1964), what we found was the facts described and quoted *supra*, namely that while it was true that Salvatore's original diagnosis of schizophrenia had been changed, it had been changed to still another diagnosis of "psychosis"—"psychosis with psychopathic personality, depressed episode". Thus the Solicitor General had led this Court, and counsel, to believe that the final diagnosis pronounced no findings of psychosis at all, whereas in fact it was a diagnosis of psychosis of such severity as to render Salvatore incompetent to stand trial as a matter of law.

In Appendix D hereto *infra*, pp. 77a-84a, we print correspondence of May-June 1965 between Mr. Glasser, DiPietro's former attorney Mr. Steinberg, and Solicitor General Cox, relating to the above matter of the lodging of the medical documents in this Court and the Solicitor General's description of their contents, late in 1963. We respectfully contend that, in that correspondence, the Solicitor General failed to dispose of the extremely troublesome questions raised by us, and we respectfully request this Court to examine for itself with closest attention the items printed in our Appendix E hereto, *infra*.

It remains, in this statement of the case, to note the decisions of both of the Courts below in this §2255 proceeding. The District Court's lengthy opinion is printed in Appendix B hereto, *infra*, and the Court of Appeal's opin-

ion is printed in Appendix A hereto, *infra*. Both of those Courts took essentially the same line of reasoning. They reasoned, in essence, that our §2255 papers had produced nothing significantly new for the purposes of a required showing under §2255; that our central §2255 issue (prejudice caused to co-defendants by Salvatore Panico's conduct in the 1962 narcotics trial) had been settled against us in the direct review proceedings in 1962-1963 and was now precluded for §2255 purposes; that anyhow the issue was not the *cause* of Salvatore's mental condition or of his courtroom misconduct but the issue was the *effect* of Salvatore's conduct on the rights of co-defendants and whether the trial Court had adequately protected those rights in the circumstances, and that the trial Court had given such adequate protection. Both of the Courts below also questioned the probativeness of Dr. Katz's findings. Both of those Courts also emphasized the widespread misbehavior of other defendants during the 1962 narcotics trial, and from this both of the Courts went on to theorize that Salvatore and the co-defendants were all united in a deliberate plot to wreck the trial—the same theory which resulted in the prior denials of relief in the 1962-1963 review proceedings. Interestingly, both of the Courts below also, through some strange slippage perhaps of their judicial disinterestedness, saw fit to leave out the word "psychosis" when they quoted the final Dannemora diagnosis.

Certain additional serious factual errors, occurring in the opinion of the Court of Appeals (Appendix A hereto, *infra*), must be noted. At p.3a, *infra*, the Court of Appeals, evidently referring to the present petitioners Carmine Panico and Carlie DiPietro, as "the two defendants", states that they were held in contempt at the conclusion of the first narcotics trial (before Judge Levet) and that these decisions were affirmed on appeal. This is absolutely incorrect, neither Carmine Panico nor Carlie

DiPietro was held in contempt at the first trial. This serious error of fact in the Court of Appeals' opinion herein is significant because it indicates the mode of unsatisfactory thinking in what appears to have become a judicial "folklore" attitude among the lower Courts in this case in support of the theory that Carmine Panico and Carlie DiPietro were in a plot with Salvatore to wreck the trial. It is undisputed that all of Carmine's own misbehavior in the second narcotics trial (before Judge McMahon) occurred in immediate and direct response to Salvatore's own situation of ordeal; Carmine reacted symbiotically, as we earlier phrased it, to the sufferings of his brother Salvatore. See, in our appeal appendix herein, the transcript of the Carmine Panico contempt proceedings at A99a *et seq.* As for Carlie DiPietro, it is undisputed that his misbehavior in the second trial was likewise and invariably an immediate and direct response to conduct of Salvatore which was extraordinarily provoking twards DiPietro as Salvatore vented special rage against DiPietro, shoutingly accusing him before the jury of being a narcotics violator. See, in our appeal appendix, the transcript of the contempt proceedings against DiPietro at A89a *et seq.*, especially at A90a and A96a.

The Court of Appeals is also factually in error in its statement at p.5a (Appendix A hereto, *infra*) that Salvatore at the inception of his outbursts was being represented by assigned counsel "who had represented him very capably during the first trial". It is indisputable that the latter assigned counsel, Mr. Todaro, had never represented Salvatore anywhere. This factual error of the Court of Appeals is another instance of the slippage of factual accuracy on the part of the lower Courts in this case, as they apparently strive for excuses or rationalizations to justify their belief (*never tested in an evidentiary hearing*) that Salvatore's misbehavior was part of a plot to wreck the trial.

The Court of Appeals again factually errs at p.7a (Appendix A hereto, *infra*), stating that after Salvatore was gagged and shackled, "no further incidents occurred during the remainder of the trial." We have previously shown (pp. 20-23, *supra*) that Salvatore's outbursts continued very intensely and numerously after that stage (the gagging and shackling). This factual error of the Court of Appeals apparently denotes, again, that Court's perhaps wishful thinking that Salvatore was faking his outbursts and that he "sanely" stopped them when firm measures were applied.

Perhaps the most serious factual error of the Court of Appeals is at p.9a (Appendix A hereto, *infra*), where, referring to the final Dannemora diagnosis of September 1963 (which the Court of Appeals, at p.8a, *infra*, misquotes, as above noted, by leaving out the word "psychosis"), the Court inexplicably states that this Dannemora information of September 1963 "cannot be really considered new because this information was submitted to this Court on direct appeal of the convictoin, it was argued by both sides as fact and was considered by us in reaching our decision". How could the Dannemora medical information of *September 1963*, which did not even become known to anyone until late *November or early December 1963* when the Solicitor General produced it in this Court, how could this information of *September-December 1963* have been before the Court of Appeals, where Salvatore's contempt conviction was affirmed in *September 1962*, the narcotics appeals were argued in *January 1963*, and those appeals were decided in *June 1963?* This factual error of the Court of Appeals, in which that Court *imagines* it knew all about Salvatore's final Dannemora medical history during the 1962-1963 appeals, is hard to reconcile with any supposition that the Court of Appeals fully mastered the factual record in this §2255 proceeding.

* * *

As to the Government's presentation in the District Court in opposition to our within §2255 motion, this consisted only of a two-page affidavit urging that "the issues raised in the instant motion were litigated at trial and in the direct review proceedings * * * and * * * Section 2255 is not available for review of matters in the nature of newly discovered evidence" (A229a to A230a).*

As to the record facts relating to our companion motion to disqualify the sentencing Judge as a "material witness" pursuant to 28 U.S.C §455, we treat those facts in connection with our "Reasons" on that subject *infra.*

Reasons for Granting the Writ

There are apparently three main lines of reasoning, in the respective opinions of the Courts below, for denying us §2255 relief without a hearing: (1) that our point about prejudice caused to co-defendants by Salvatore's 1962 trial outbursts is not available in a §2255 proceeding because it was raised and decided in the direct review proceedings: (2) that no new, significant medical facts are presented in our §2255 papers; and (3) that, in any event, whatever may have been the *cause* of Salvatore's outburst, even if the cause were in truth actual raving insanity, it is not that *cause* which matters, instead what matters is the *effect* of Salvatore's misconduct on the rights of the co-defendants, and that effect raises no §2255 issue of fair trial because the Trial Judge adequately protected the rights of the co-defendants and because anyhow the co-defendants may not be heard to complain of Salvatore's outbursts since they themselves misbehaved so badly that one must conclude they were in a deliberate plot with Salvatore to wreck the trial.

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* The Government also filed a short memorandum of law for the same points. In the Court of Appeals the Government's presentation was substantially the same.

In this decisional setting—the setting of the reasoning of both of the Courts below, and on the record as a whole —the following reasons favor the granting of certiorari:—

1. We believe our Statement of the Case, *supra,* meets the objection that § 2255 relief here is precluded by the previous direct review proceedings. No Court in the direct review proceedings, except this Court in the proceedings late in 1963 for certiorari to review the narcotics convictions, had before it the final Dannemora Clinical Summary of September 1963 pronouncing Salvatore a psychotic, and in this Court the actual purport of that Clinical Summary was incorrectly stated by the Solicitor General, and as to the supporting documentation "lodged" by the Solocitor General, there is the gravest doubt whether this Court (or opposing counsel) was given by the Solicitor General a fair opportunity to detect the incorrectness of the Solicitor General's description of the contents of the document. Furthermore, no Court, including this Court, has ever had *the complete Dannemora day-to-day medical records,* which Dr. Katz has so strongly emphasized are indispensable for an informed medical judgment concerning Salvatore's mental condition during the 1962 trial. While the Courts below conclusorily write that Dr. Katz's present, tentative (*i.e.,* pending study of the full Dannemora medical records) medical opinion is "probatively questionable", those Courts apparently have not perceived that the only way to find out really what may be the actual probative value of Dr. Katz's opinion would be by holding a full evidentiary hearing in which all of the Dannemora medical records and all of the Dannemora medical personnel having knowledge could be produced for evidentiary evaluation. To say, as the Courts below do, that Dr. Katz's opinion is "nothing new" and is merely "cumulative expert testimony", is to miss not only this last mentioned problem of the unavailability thus far of the complete

Dannemora day-to-day medical records, but it misses also the disturbing further problem that this Court itself, in reversing Salvatore's contempt conviction (375 U. S. 29), remarked that the previous expert medical testimony was "conflicting". To all of which we would add also, again, that, judicially, something is left to be desired when a scientist of the practically magisterial preeminence of Professor Jay Katz is, for all practical purposes, ignored (not to say invidiously disparaged) by a Federal District Judge and Federal Court of Appeals Judges.

2. In our above "Reason" number 1, we believe we have given a persuasive answer also to the second line of reasoning of the Courts below, namely, that no new, significant medical facts are presented in our § 2255 papers. Not only do we think that the disclosures about the way the Solicitor General handled the final Dannemora Clinical Summary are new and significant, and not only do we think also that Dr. Katz's opinion is new and significant, but we urge above all that, if the § 2255 procedure has ever meant anything in a case involving questions of the mental competence of a person, it must mean in this case that the present petitioners have surely made a sufficient showing of new and significant medical facts at least to justify the holding of a plenary § 2255 evidentiary hearing which, it respectfully seems to us, would be the only fair way to come to a proper judicially informed conclusion as to whether in truth there are here involved, or not, new and significant medical facts.

3. As to the third line of reasoning of the Courts below, that it is the *effect* and not the *cause* of Salvatore's misconduct which counts here, we submit as follows: As we understand this theory of the Courts below it is, that the medical cause of Salvatore's conduct *does not matter at all* (even if such medical cause was out-and-out psychosis), because the other defendants themselves behaved

badly and because also they were sufficiently protected in their right to a fair trial by the steps the Trial Court took to caution the jury against prejudice generated by Salvatore's conduct.

The difficulty with this theory of the Courts below is twofold. First, those Courts have themselves undermined this theory by repeated references to the idea of a plot by the defendants to wreck the trial. As we understand the thinking of the Courts below in this latter aspect, it is that not only did the Trial Court protect the defendants very solicitiously but that also the defendants were themselves inviting and seeking trouble by provoking incidents, so that if they did not get all the trial fairness that would be ideally possible it was partly if not wholly their own fault. But the moment one begins to speak of a plot or of deliberate provocations by the defendants themselves, then one must ask what role in this plot and in these provocations was played by Salvatore Panico, who was indisputably by far the most seriously misbehaving defendant. And when one asks this latter question, how can the answer be that Salvatore was a party in such plotting and such deliberate conduct if Salvatore's misbehavior was caused by uncontrollable psychological forces in the medical sense?

Furthermore, the theory of a plot sits especially poorly in regard to the present petitioners Carmine Panico and Carlie DiPietro. Literally and totally every single act of misbehavior—*i.e.*, of allegedly "plotted" misconduct by Carmine Panico and DiPietro—was the direct and immediate result of something done by Salvatore Panico. All of Carmine's misconduct was in direct response to crises connected with his brother Salvatore during the trial. All of DiPietro's misconduct was in direct response to intolerable behavior by Salvatore aimed especially at DiPietro. If Salvatore was acting out of mental illness,

and if Carmine and DiPietro were solely reacting to Salvatore's actions (as is indubitably the case), where is the "plot" involving Carmine and DiPietro *vis a vis* Salvatore?

There is an even more unjust flaw in the theory of the Courts below that the "cause" of Salvatore's conduct does not matter, that only its "effect" matters, that even conceding that Salvatore was a raving maniac in the trial no other defendant has cause for constitutional complaint now. This is absolutely the first time in the history of this case that any one of the Judiciary who have been concerned with this case or that anyone from the side of the Government has suggested at all that, yes, it may well be true that Salvatore Panico was acting out of uncontrollable mental illness and that nevertheless everything was and is constitutionally alright. Always and invariably, until the Courts below made this *de novo arguendo* concession that Salvatore could have been a raving maniac but it would not matter if he was, the theory of this case enunciated or apparently followed by all of the Courts and prosecutive personnel has been that Salvatore was not only not mentally ill but that he was a crafty plotter of the deepest dastardly dye, a figure of prime reprehensibility in the annals of American criminal jurisprudence, a monster of courtroom insolence and contemptuousness, a villian and an enemy of orderly courtroom justice, a faker—in short, everything and anything except a helplessly mentally ill man. Yet now, for the first time, we are told that all of the decisional history of this case, a history which at every step has depended dispositively on the firmly and even indignantly announced judicial belief that Salvatore was not mentally ill but was faking mental illness, now for the first time we are told that all of this decisional history would have come out exactly the same

if the opposite medical fact had been accepted by the Courts. We are now told for the first time that it has never really been important at all for the several judicial decisions in this case that the Judges believed Salvatore was faking mental illness. We are told now that all of those Judges would have spurned the constitutional contentions of Salvatore's co-defendants even if those Judges had been convinced that Salvatore was a helpless raving maniac during the trial.

We respectfully ask the Justices of this Court to ponder: Is it really conceivable, in a rational and fair-minded universe of judicial discourse, that this case would have been decided the way it was previously decided if the Trial Judge had entered upon the record the *arguendo* concession that Salvatore Panico could in truth be regarded as a medically confirmed (or even medically arguable) raving maniac? Is it conceivable that, with such *arguendo* concession lodged upon the contemporaneous trial record, the appellate Courts would have rejected the contentions of the other defendants as to denial of fair trial caused by Salvatore's conduct, solely on the basis that the Trial Judge had diligently intoned protective warnings to the jury at every required juncture? Is it conceivable that the appellate Courts would have ruled against the co-defendants' contentions on the theory that the harm done by the *arguendo*-conceded raving maniac was constitutionally tolerable because the raving maniac was in a plot with other defendants to make believe he was a raving maniac? How could he be both a raving maniac in medical actuality (*via arguendo* concession), and a member of a plot to fake his own raving maniacal conduct?

4. Certiorari should be granted here—or a re-hearing of the denial of certiorari in December 1963 should be

granted *sua sponte* by this Court*—on the ground, without more, that the decencies of the administration of Federal criminal justice require an examination by this Court (or an order of remand to take proofs for the purpose of an ultimate examination by this Court) concerning the circumstances of the Government's strange presentation, before this Court in the 1963 certiorari proceedings, of the Dannemora medical documents.

5. Certiorari should be granted also to review the denial of our motion requesting the sentencing Judge to disqualify himself, in this §2255 proceeding, as a "material witness" under 28 U.S.C. §455. As seen, an important if not controlling decisional factor in the determination of the Trial Court in the 1962 narcotics trial that Salvatore Panico's conduct was deliberate rather than caused by mental illness, was the Trial Court's own personal observations. The latter statute (quoted in Appendix G hereto, *infra*) requires a Judge to disqualify himself "in any case in which he * * * is or has been a material witness * * * on the trial, appeal, or other proceedings therein." We are aware that the decisions have tended to deny requests for disqualification under §455 on the ground that §2255 is best administered by the Judge who conducted the trial. *E.g., Mirra* v. *United States*, 379 F. 2d 782 (C. A. 2 1967), cert. denied 389 U. S. 1022. However, the theory that it would be bad to disrupt the work of the Federal District Courts in §2255 proceedings by disqualifying the very Judge who knows the facts of the case proves too much, especially in a case of the present type. If this rationale be applied unqualifiedly, the dis-

* As mentioned *supra*, shortly after we file this petition for certiorari we shall move for leave to file, out of time, a petition for rehearing of the denial of certiorari to review the narcotics convictions (December 1963), on the procedural authority of *United States* v. *Ohio Power Co.*, 353 U. S. 98.

qualification provision of §455 could never operate in any §2255 proceeding and §455 would *pro tanto* be reduced to a nullity, it would *pro tanto* be wiped from the United States Code.

The issue of the Judge as a "material witness" in our case cannot be avoided by any such general rationale because, again, several times in the trial Judge MacMahon announced his own observations and conclusions that Salvatore Panico was not suffering from any medically significant mental disorder but was faking. This is the very issue which must now be re-adjudicated by an evidentiary hearing in this §2255 proceeding. How can Judge MacMahon's 1962 observations be given any probative weight without the Judge's having to take the witness stand in a §2255 hearing?

Furthermore, a Judge who is going to be a material witness in a §2255 proceeding, especially in the peculiarly personalized factual circumstances here presented, should not sit in that proceeding for any purpose, including the decision of preliminary questions of law such as the question of whether a case is made out for an evidentiary hearing. This would appear to be the meaning of the words of 28 U.S.C. §455 that a Judge who is a material witness ought not "to sit on the trial, appeal, or other proceeding therein". While there appear to have been two reported decisions to the effect that the statute (28 U.S.C. §455) does not prevent a disqualified Judge from sitting with respect to preliminary orders, those decisions were rendered at a time when the statute provided only that a Judge challenged thereunder might not "sit on the trial", *i.e.*, this was prior to the addition of the statutory language "or other proceedings therein"; furthermore the two decisions to which we refer (cited *infra*) dealt with preliminary matters of a merely formal kind, in no way resembling the critical and

dispositive kind of question involved in a determination of whether a §2255 motion presents a case for an evidentiary hearing. The two cases referred to are *In Re Fox West Coast Theatres,* 25 F. Supp. 250, 258 (S. D. Cal. 1936), affirmed 88 F. 2d 212, cert. denied 301 U. S. 710 reh. denied 304 U. S. 772; *Borough of Hasbrouck Heights, N. J.* v. *Agrios,* 10 F. Supp. 371, 374 (D. N. J. 1935). It is noteworthy also that where the disqualification asserted under 28 U.S.C. §455 refers to a case in which the Judge "has a substantial interest, has been of counsel, [or] is or has been a material witness", as distinct from merely a case where the Judge is alleged to be "so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit", the Judge's measure of discretionary choice as to whether or not to disqualify himself is not left merely to the Judge's own personal opinion or merely to his own "conscience and judgment", but in such former cases it would appear to be the Judge's duty to disqualify himself. *Ex parte N. K. Fairbank Co.,* 194 Fed. 978, 987-990 (M. D. Ala. 1912).

6. If certiorari is granted for any of the foregoing reasons, and in any event in view of the granting of certiorari in *Turner* v. *United States,* no. 190, cert. granted June 2, 1969, this case should be reviewed in regard to the question of whether the petitioners, in their 1962 narcotics trial, were denied due process of law and the privilege against self-incrimination by operation of the provisions of 21 U.S.C. § 174 establishing a presumption of knowledge of importation of narcotics (in this case heroin) unless the defendant explains possession.

CONCLUSION

It is respectfully submitted that this joint petition for a writ of certiorari should be granted.

Respectfully submitted,

ABRAHAM GLASSER,
JEROME LEWIS,
Attorneys for Petitioners,
Carmine Panico and
Carlie DiPietro.

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 468-9—September Term, 1968.

(Argued March 26, 1969 Decided June 25, 1969.)

Docket Nos. 32953-4

CARMINE PANICO and CARLIE DIPIETRO,

Movants-Appellants,

—against—

UNITED STATES OF AMERICA,

Appellee.

Before:

WATERMAN, MOORE and FRIENDLY,

Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge,* denying appellants application for relief under 28 U.S.C. §2255 and refusing to disqualify himself under 28 U.S.C. §455 as a "material witness."

Affirmed.

JEROME LEWIS, New York, N. Y. (Abraham Glasser, New York, N. Y., on the brief), *for Movants-Appellants.*

ARTHUR A. MUNISTERI, Assistant United States Attorney, New York, N. Y. (Robert M. Morgenthau, United States Attorney for the Southern District of New York, N. Y., and Roger J. Hawke, Assistant United States Attorney, New York, N. Y., on the brief), *for Respondent-Appellee.*

MOORE, *Circuit Judge*:

Carmine Panico (Carmine) and Carlie DiPietro appeal from an order of the District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge*, entered on September 19, 1968, which denied their joint motions for relief under 28 U.S.C. §2255. The order also denied a joint motion for disqualification of the sentencing judge because he was, they assert, a material witness. The basis of appellants' contentions here is that they were denied a fair trial because of jury prejudice created by the outrageous behavior of a co-defendant, Salvatore Panico (Salvatore)—the brother of Carmine—who was allegedly in the grip of uncontrollable psychological forces at the time. Specifically, ignoring their own repeated misconduct at the trial, appellants claim that Salvatore's "atrocious verbal and physical outbursts of violence" during the trial "must have antagonized the jury" not only against Salvatore but also against all the co-defendants, thereby making it impossible for the jury to give a fair and unprejudiced consideration to appellants' guilt or innocence. The appellants assert that there has not been an adequate adjudication of Salvatore's medical condition and that a hearing should have been held on this application on the cause of his misbehavior.

The appellants, along with eleven other co-defendants, were convicted on July 10, 1962, after a lengthy and difficult trial, of a substantial narcotics conspiracy. The trial lasted some ten weeks and was repeatedly interrupted by outbursts from the appellants, Salvatore and other co-defendants, who shouted obscenities at the trial court, the jury and the prosecutor, and, in the hope of provoking or creating a reversible error, generally attempted to disrupt the trial in every way possible. The incidents which occurred at trial are set forth in detail in our prior opinion on direct review of appellants' convictions, *United States* v. *Bentvena,* 319 F. 2d 916 (2d Cir. 1963), and accordingly a short summary will suffice so that this present appeal is not viewed in isolation.

A first trial before Judge Levet, which lasted six months and wound its way "over every conceivable type of obstruction and interruption," resulted in a mistrial on the eve of the summations when the foreman of the jury broke his back in an unexplained fall down a flight of stairs in a deserted building late at night and there were no alternate jurors remaining to replace him. Because of continual and frequent delays and apparent illnesses, Judge Levet found it necessary to remand all the defendants who were out on bail. This order was affirmed on appeal. *United States* v. *Bentvena,* 288 F. 2d 442 (2d Cir. 1961). The two defendants were held in contempt at the conclusion of the trial and these decisions were affirmed on appeal. *United States* v. *Galante,* 298 F. 2d 72 (2d Cir. 1962).

Between the first and second trials, the defendants were again freed on bail. After continuous delays, during which some defendants claimed that they could not engage counsel although they had no problem raising substantial bail, trial was set for April 2, 1962. During the empaneling of the

jury, Salvatore made his first outburst, which was echoed by co-defendant Loicano. The Court later found it necessary to remand all the defendants, which order was affirmed by this Court. *United States* v. *DiPietro*, 302 F. 2d 612 (2d Cir. 1962). A renewal of the misadventures of the previous trial seemed imminent, as this Court remarked at the time.

The prediction proved accurate. The trial court was besieged with numerous motions for mistrial, severance, delay, continuance and adjournment, which were denied, renewed and denied again. Certain defense counsel were repeatedly and inexcusably tardy. Throughout the trial there were constant claims by the defendants and some counsel of numerous incapacitating illnesses and injuries, all of which failed to be confirmed by physical examination. Five of the fourteen defendants, including Salvatore, claimed insanity. Verbal outbursts were commonplace. Under cross examination, a co-defendant Mirra threw his chair at the Assistant United States Attorney, but his aim was poor. Appellant Carmine shouted obscenities at the trial court and the prosecutor.

There were many more acts of misconduct requiring the Court to station a large number of marshals in the courtroom, to search spectators and to have both Panicos and Mirra gagged and shackled during the latter part of the trial. See discussion *infra*. It is sufficient to say at this point that there was a concerted effort to interfere with the judicial process. We have previously indicated that "more abhorrent conduct in a federal court and before a federal judge would be difficult to conceive." 319 F. 2d at 930. At the conclusion of the second trial, eleven defendants were summarily held in contempt for their misconduct, including Salvatore.

THE SECTION 2255 APPLICATION

The appellants' application for relief under Section 2255 was denied by the trial court on the grounds that the claim of prejudice had already been litigated at trial, denied and the denial affirmed on appeal and that the cause of Salvatore's outrageous conduct was irrelevant, or at most only incidental, to the problem of whether the trial court had taken adequate measures to assure that appellants received a fair trial. The Court also rejected appellants' claim that post-trial medical information concerning Salvatore, which first came to light after the sentencing of the defendants and which is now supplemented by an affidavit of a psychiatric consultant, was new or that it shows that the trial judge erred in finding that Salvatore's acts were deliberate and calculated to disrupt the trial.

The court below first noted that most of the outbursts portrayed in the appellants' supporting affidavits occurred in the absence of the jury and then detailed Salvatore's conduct which took place before the jury. We will summarize them briefly. Salvatore first made an outburst because he was assigned counsel at the commencement of the trial to serve until his retained counsel returned later in the week from another trial. He shouted to the jurors then being empaneled:

> Do these people know I don't have a lawyer? What is this, Russia? There's nobody representing me here.

He was, in fact, then being represented by his temporarily assigned counsel who had represented him very capably during the first trial. Salvatore refused to talk to him, however. No significant disturbances followed for nearly seven weeks, but on May 23, 1962 after a brief recess, at the moment the trial judge entered the courtroom, Salvatore

jumped into the jury box and, walking along the inside railing and waving his arms in the air, shouted at the jurors:

> Get out of here. The Judge has got me guilty. Big John, Joe B, they are the junk pushers. We're innocent. My brother and I, we haven't got anything to do with this thing. They have me in jail already. Do you understand me? They have us in jail. Twenty years they want to give me.

The Court ordered Salvatore removed from the courtroom. Appellant Carmine then joined in the disruption, shouting "I want to see my brother." The trial was recessed. The next day, another disruption occurred during the testimony of defendant Mirra, but the trial was able to proceed. On the following day, during the first few minutes of testimony, Salvatore blurted out "DiPietro is talking about me there. He is the convicted dope pusher. Separate me from him." DiPietro responded "Stop him. I told you . . . Every one of my witnesses, he made a holler." The jury was thereafter excused. In the absence of the jury, DiPietro stated to the Court "I never made a sound all this time. If he comes into this courtroom when I am here, I will strangle him. He interrupted my seven witnesses. Chain him down, if you got to." The trial was subsequently recessed and the Court ordered an examination of Salvatore by three psychiatrists.

Following their examination, a hearing was held on Salvatore's competence to stand trial, that is, whether he was able to understand the nature of the charge against him and whether he could assist his lawyer in his own defense. At the conclusion of the hearing, after listening to the expert testimony, the trial court found Salvatore competent to stand trial and warned him about further outbreaks.

The trial was resumed and Salvatore again disrupted the proceedings. The Court ordered that he be gagged and shackled to restrain him from further outbursts. No further incidents occurred during the remainder of the trial.

Subsequently, Salvatore made two suicide attempts under circumstances which made success impossible. The first was a hanging attempt in his cell when his brother was present. In the other, he made shallow cuts on his arm with a razor blade, which resulted in little loss of blood and required only first aid treatment. In both incidents he was not seriously injured. Thereafter, this Court ordered another psychiatric examination of Salvatore's competence to stand trial. Again, on the basis of psychiatric reports and examinations, the trial court found him competent.

After each and every outburst occurring before the jury, the trial court patiently and repeatedly instructed the jury that they must disregard the disturbances and remarks of any defendant. The judge stated that "the law requires . . . calm, cool and deliberate consideration of the evidence," and that the disturbances in court were not to be considered. He affirmed and re-affirmed to the jury to put the incidents of misconduct out of their minds and to be calm, dispassionate and impartial in not allowing such incidents to prejudice them.

The court below stated that the material question was whether Salvatore's conduct during trial, sane or insane, deprived appellants of a fair trial, and not, as contended by the appellants, simply whether or not Salvatore was insane. "The focus of the inquiry," in the Court's view, "is . . . not on the cause of [the] misconduct, but on its effect upon appellants' rights."

While it may be true that the condition of Salvatore's mind was related to the fairness of appellants' trial, we agree with the court below that it is only incidentally related and that the fundamental question is whether the trial court dealt adequately with possible prejudice under the facts of this case. In short, the question is whether appellants' constitutional rights were violated, not whether someone else's rights were infringed. This exact question was raised on direct appeal and we held then that the trial court did everything in its power to minimize the effects of the disruptive conduct and outbursts of the appellants, Salvatore and other defendants. Here the perpetrators of much of the interruptions are claiming that they were prejudiced by disruptions of their co-defendant, in which they repeatedly and knowingly joined. Moreover, we also held then that the steps taken by the trial court were sufficient, reasonable and necessary to protect the rights of all the defendants. Inasmuch as these same contentions were litigated during trial and on direct review from the narcotics conviction, they cannot be relitigated in a proceeding under §2255. *Castellana* v. *United States*, 378 F. 2d 231, 233 (2d Cir. 1967).

Appellants contend, however, that their application presents "new facts" not previously considered and that because of the new evidence, a hearing should have been held. The allegedly new facts are, first, that after his conviction Salvatore was diagnosed a schizophrenic by a psychiatrist at Sing Sing Prison on July 12, 1962 and was committed to Dannemora State Hospital by order of a Westchester County Judge on August 22, 1962. However, the diagnosis of schizophrenia was merely tentative and later determined to be incorrect. It was subsequently downgraded to psychopathic personality, depressed episode, and on

September 17, 1963 Salvatore had recovered sufficiently to return to prison. While this evidence was not before the court at trial, it is only cumulative of the expert testimony and psychiatric reports which the trial judge had on two occasions during trial. It also cannot be really considered new because this information was submitted to this Court on direct appeal of the conviction, it was argued by both sides as fact and was considered by us in reaching our decision. See Judge Friendly's dissent on Salvatore's appeal from his contempt conviction nine months earlier. 308 F. 2d at 129. There is, therefore, no basis for claiming that this post-conviction psychiatric data is either new or that it would have warranted relitigation of the claim that Salvatore's presence and conduct at the trial prejudiced appellants' rights to a fair trial.

The second item of evidence, which appellants claim is "new," is an affidavit by a Dr. Jay Katz, a psychiatrist retained by appellants for the purpose of this application. Based primarily on a reading of various parts of the trial transcript, exhibits and reports from psychological tests conducted in late December 1966, and on three and one-half hours of psychiatric interviews with Salvatore, held in late December 1966 and early January 1967, Dr. Katz claims that Salvatore was "helpless to control his conduct" during the 1962 trial. Appellant alleges that "Dr. Katz' findings are significant because of their authoritative *retrospective* impact on the entire medical picture of this record." Appellants' Brief at page 67.

Aside from the serious problems in making an accurate retrospective diagnosis based on a reading of a cold record over four years after the relevant event, Dr. Katz's conclusions can in no meaningful way be characterized as new evidence. At best his report is cumulative expert testi-

mony. Its probative value is also questionable in view of the fact that he relied on only three and one-half hours of interviews with Salvatore and on a reading of the record and reports compiled during trial. A psychiatrist who examined Salvatore three times during the 1962 trial, Dr. Hyslop, noted in his report that citing instances of Salvatore's behavior from the trial record was "of little value in determining whether or not conduct was a product of mental disorder."

We conclude then that neither the tentative diagnosis of the psychiatrist at Sing Sing Prison, nor Dr. Katz' subsequent "retrospective" report warrants a full hearing on the issue of Salvatore's insanity during the 1962 trial. Neither can it be said that either is new evidence. It is also concluded that the identical issue raised here was previously litigated and determined adversely to the appellants.

MOTION FOR DISQUALIFICATION OF THE TRIAL COURT

Appellants seek to disqualify the trial court from hearing their Section 2255 application on the ground that he was a "material witness." 28 U.S.C. §455. Judge MacMahon denied the motion on the ground that he was not a witness.

Section 455 of Title 28 provides:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

One of the purposes for which Congress passed Section 2255 was to make use of the personal observations of

the trial judge of trial occurrences in ruling upon attacks on convictions because of such occurrences. *Mirra* v. *United States;* 379 F. 2d 782, 788 (2d Cir. 1967). As appellants recognize, to disqualify a judge in a Section 2255 application because of the fact that he made such observations would defeat this purpose entirely. However, appellants attempt to avoid this position by stating that, in view of the fact that Judge MacMahon announced his own observations at trial that Salvatore was faking and was not suffering from any psychological disorder and that Judge MacMahon is "going to be a witness in a Section 2255 proceeding," he "should not sit in that proceeding for any purpose." Appellants' Brief at page 70.

In view of our conclusion that no evidentiary hearing is warranted, it is determined that the refusal of the trial court to disqualify itself in hearing the Section 2255 application was not erroneous. As lower courts have recognized Section 455 does not in any way affect the trial court's sitting with respect to preliminary orders. See *In Re Fox West Coast Theatres,* 25 F. Supp. 250, 258 (S.D. Cal. 1936), *aff'd* 88 F. 2d 212, *cert. denied sub nom. Talley* v. *Fox Film Corp.,* 301 U.S. 710, *reh. denied* 302 U.S. 772 (1937), and *Borough of Hasbrouck Heights, N. J.* v. *Agrios,* 10 F. Supp. 371, 374 (D. N. J. 1935), where the statutory language was slightly different. *Halliday* v. *United States,* 380 F. 2d 270 (1st Cir. 1967), which appellants cite, holds nothing to the contrary. There the First Circuit held that where a required *hearing* under Section 2255 was to redetermine a factual issue presumably previously decided, the original judge should not preside. The decision specifically disclaimed any prohibition on the original judge from passing upon the legal sufficiency of an application under Section 2255, which is the present case. *Id.* at p. 274.

The refusal of the lower court to disqualify itself was, therefore, not an abuse of discretion.

We have considered the other arguments made by appellant and find that they are without merit. The order of the District Court is affirmed.

APPENDIX B

Opinion of the United States District Court

(Filed—September 19, 1968)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CARMINE PANICO and CARLIE DIPIETRO,

Movants,

v.

UNITED STATES OF AMERICA,

Respondent.

Appearances:

JEROME LEWIS, New York, N. Y., for movants.

ROBERT M. MORGENTHAU, U. S. Attorney, Southern District of New York (David A. Luttinger and Michael W. Leisure, Asst. U. S. Attorneys, Southern District of New York, of counsel), for respondent.

MACMAHON, *District Judge.*

Petitioners were two of thirteen defendants convicted by a jury after a ten-week trial of a conspiracy to import and distribute vast quantities of heroin in violation of the federal narcotics laws. They move under 28 U.S.C. § 2255 to vacate and set aside the judgments of conviction and the sentences imposed upon them on July 10, 1962. They

also move to disqualify the trial court from considering their § 2255 application on the ground that the court "is of necessity a material witness."[1] We deny the motions because the claims asserted are irrelevant to the issue of whether petitioners were denied a fair trial, they were raised and rejected at trial and on direct appeal,[2] and they cannot be resurrected by the cumulative expert testimony proffered as new evidence.

The core of this application is a claim that petitioners were "denied a fair due process trial" because of allegedly insane conduct of a co-defendant, Salvatore Panico ("Salvatore"), during trial and rulings of the trial court with respect to it.

Specifically, it is claimed that Salvatore made "atrocious verbal and physical outbursts of violence" during the trial which "must have antagonized the jury" against him and all of the co-defendants so as to make it impossible, or strongly unlikely, that the jury would give fair and unprejudicial consideration to defendants' guilt or innocence. Overlooking their own contemptuous conduct before the jury, petitioners assert that Salvatore's conduct was particularly prejudicial to them because he was closely identified with his brother, Carmine Panico, and because some of Salvatore's outbursts accused DiPietro of

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[1] 28 U.S.C. § 455.

[2] *United States* v. *Bentvena*, 319 F. 2d 916 (2d Cir.), *cert. denied* [*Ormento* v. *U. S.*; *DiPietro* v. *U. S.*; *Fernandez* v. *U. S.*; *Panico* v. *U. S*; *Mancino* v. *U. S.*; *Scircmammano* v. *U. S.*; *Mirra* v. *U. S.*]; 375 U. S. 940 (1963).

being a "convicted dope pusher." Scaling down the claim of raging insanity made at trial, they argue that Salvatore, if not a raving maniac, was at least in the grip of emotional forces of a psycotic nature which made his conduct and outbursts uncontrollable. They contend that the trial court should have conducted further psychiatric hearings and have granted defendants' motions for a severance, even if Salvatore were found sane, in order to insure against prejudice to them. Finally, it is asserted that post-trial medical information concerning Salvatore, which first came to light after the sentencing of the defendants and which is now supplemented by an affidavit of a psychiatric consultant, shows that the trial judge erred in finding that Salvatore was mentally competent and that his acts were deliberate and calculated to disrupt the trial.[3] Thus, the entire thrust of the affidavits supporting this application is an attempt to show that due to a psychotic condition Salvatore was unable to control his conduct during the trial. All of these claims are irrelevant to the question of whether petitioners were denied a fair trial, and all were raised and rejected at trial and on direct appeal. We, therefore, reject them here. We turn now to the facts.

This application cannot be understood in the vacuum portrayed by petitioners. Rather, a realistic approach demands that Salvatore's conduct during trial be viewed not

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[3] Counsel confuses our later finding on adjudging Salvatore guilty of contempt with our earlier finding that he was capable of standing trial.

in isolation, but in the context of the entire trial.[4] Petitioners were two of twenty-nine defendants accused of violating the federal narcotics law. They were tried for the second time with twelve co-defendants, and all but one were convicted.

The second trial, which lasted ten weeks, had been preceded a year earlier by a trial which had crawled "along its rock road for six months over every conceivable type of obstruction and interruption" before ending in a mistrial on the eve of summations when "the foreman of the jury broke his back in an unexplained fall down a flight of stairs in an abandoned building in the middle of the night."[5] The first trial was so "bedeviled by frequent de-

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[4] Some glimpse of the parallel, outrageous and unprecedented conduct of the defendants in this case, designed to frustrate, delay, abort, or inject reversible error into, the trial may be gained by referring to some of the related cases in this and the appellate courts: *United States* v. *Bentvena*, 288 F. 2d 442 (2d Cir.), *aff'd sub nom. Fernandez* v. *United States*, 81 S. Ct. 642, 5 L. Ed. 2d 683 (1961); *United States* v. *Galante*, 298 F. 2d 72 (2d Cir. 1962); *Loicano* v. *MacMahon*, Docket No. 27487, 2d Cir., Apr. 4, 1962; *United States* v. *DiPietro*, 302 F. 2d 612 (2d Cir. 1962) (*per curiam*); *United States* v. *Bentvena*, 304 F. 2d 883 (2d Cir.) (*per curiam*), *cert. denied sub nom. Mirra* v. *United States*, 371 U. S. 927 (1962); *United States* v. *Bentvena*, 308 F. 2d 47 (2d Cir. 1962); *United States* v. *Galante*, 308 F. 2d 63 (2d Cir. 1962); *United States* v. *Panico*, 308 F. 2d 125 (2d Cir. 1962), *vacated and remanded*, 375 U. S. 29 (1963); *United States* v. *Bentvena, supra*, 319 F. 2d 916; *United States* v. *Mirra*, 220 F. Supp. 361 (S. D. N. Y. 1963); *Mirra* v. *United States*, 255 F. Supp. 570 (S. D. N. Y. 1966), *aff'd*, 379 F. 2d 782 (2d Cir.), *cert. denied*, 389 U. S. 1022 (1967); *Sciremammano* v. *United States*, Docket No. 67 Civ. 3546, S. D. N. Y., Dec. 6, 1967.

[5] *United States* v. *Bentvena, supra*, 319 F. 2d at 929.

lays" and "impeded by apparent illness, accident and other misfortune"[6] that the trial judge, to insure defendants' continued presence, ordered their remand. Upon appeal from that order, the Court of Appeals, after tallying an array of incidents, remarked that the "trial judge may well have detected a general pattern of conduct not attributable to less than all of the defendants."[7] Two of the defendants were held in contempt at the conclusion of the first trial, and the contempts were affirmed on appeal.[8]

Between trials, the defendants were enlarged on bail. The case appeared on the trial calendar monthly but was adjourned on each occasion because a number of defendants claimed they were unable to retain counsel, notwithstanding their ability to raise substantial bail. As early as July 31, 1961, Judge Murphy noted that the failure to retain counsel was part of a plan to postpone trial. Despite efforts of the court, including threats of contempt proceedings, it was not until March 9, 1962 that all defendants who had not been severed on government motion had counsel, either retained or appointed by the court.

At a pretrial conference held in March, the trial date for the second trial was set peremptorily for April 2, 1962. Despite that, on the appointed day, one defense counsel had a recurrence of a chronic heart condition, there were numerous switches and substitutions of counsel, and the Panico's counsel, Mr. Aronne, although retained on September 6, 1961, was engaged in another trial which was expected to last for one week. The court denied appli-

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[6] *United States* v. *Bentvena, supra,* 288 F. 2d at 445.

[7] *Id.* at 446.

[8] *United States* v. *Galante,* 298 F. 2d 72.

cations for adjournment and assigned George Todaro, Esq., who had been through the first trial, to represent the Panicos and the defendant Loicano. During the empanelling of the jury, Salvatore made his first outburst. It was echoed a few minutes later by defendant Loicano.

Two days later, on April 4, the court found it necessary to remand all of the defendants. The remand was affirmed by the Court of Appeals which stated that the incidents on which we had relied "might well seem to indicate a renewal of the 'misadventures' of the previous trial * * *."[9] The problems were just beginning. Hardly a minute passed without a chorus of motions for mistrial, severance, etc. The court was swamped with applications for delay, continuance and adjournment. All of this prompted Judge Moore, on the basis of nothing but the cold record, to observe that: "One with a bent for statistics would find, no doubt, that if this trial were continued on every occasion that one or more of the defendants or their counsel so requested the trial would still be in progress."[10] Defendants resorted to every conceivable means to interrupt, delay and abort the trial, inject or provoke reversible error, or plant the seeds for collateral relief.

Certain defense counsel were repeatedly and inexcusably tardy. Throughout the trial, defendants and certain defense counsel claimed numerous incapacitating illnesses and injuries which physical examinations failed to substantiate. Several defendants claimed inability to understand the proceedings and consult with counsel due to aspirin-like medication administered by prison medical

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[9] *United States* v. *DiPietro, supra,* 302 F. 2d at 613.

[10] *United States* v. *Bentvena, supra,* 319 F. 2d at 936.

personnel. Five (out of fourteen) defendants, including Salvatore, claimed insanity and applied for psychiatric examinations. Verbal outbursts were commonplace. On one occasion, defendant Ormento tried to break into the robing room screaming obscenities at the judge. On another, defendant Mirra, stealing Salvatore's line, shouted, "they are all dope pushers," when asked on the stand if he knew certain co-defendants. The next morning, while under cross-examination, Mirra picked up the witness chair and threw it at the Assistant United States Attorney. The chair missed the Assistant but struck and shattered against the jury box. Petitioner Carmine Panico screamed obscenities at the court and prosecutor. Petitioner DiPietro threatened to strangle Salvatore. Referring to such misconduct, the Court of Appeals said:

> "We have described only two of the more dramatic disturbances which plagued the trial of this case for we find it neither necessary nor judicious to publicize or preserve the vile language and rebellious conduct that characterized this trial. Suffice it to say that more abhorrent conduct in a federal court and before a federal judge would be difficult to conceive." [11]

The courtroom antics were interspersed with offstage acts by defendants and certain of their counsel which always interrupted and delayed the trial. The actions of the trial court, so righteously protested by petitioners, were actually forced and necessary responses to the un-

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[11] *Id.* at 930.

precedented efforts of the defendants, including both petitioners, to thwart a fair, orderly and completed trial.[12]

In order to keep order and prevent a frustration of justice, we were compelled, among other things, to station a large number of marshals in the courtroom, search spectators, and have both Panicos and Mirra gagged and shackled during the latter part of the trial. Reviewing these measures, the Court of Appeals said:

> "If any one distinct impression is gained from a scrutiny of the record here, it is that the trial judge was justified, indeed was forced, to resort to stern measures to obtain order in his courtroom."[13]

On defendant Galante's application for bail, the Court of Appeals held that this misconduct demonstrated "a concerted effort to interfere with the judicial process * * *."[14] That conclusion was shared by nine different appellate judges who, in one context or another, have reviewed the

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[12] This was rational conduct. Defendants had seen the overwhelming evidence against them on the first trial. Contempt was nothing compared to the mandatory sentences they faced if convicted. The tactics succeeded on the first trial, where, out of a possible 107 court days between the commencement of the trial on November 21, 1960 and the foreman's mysterious fall on April 12, 1961, no proceedings were held on 32 days because of sicknesses, injuries and inexcusable absences.

[13] *United States* v. *Bentvena, supra,* 319 F. 2d at 930-31.

[14] *United States* v. *Galante, supra,* 308 F. 2d at 64.

conduct of the defendants at either or both of their trials.[15] Referring to that conduct, the Court of Appeals said:

> "We have satisfied ourselves that the prosecution did not provoke the incidents. The judge did all in his power to minimize their effect, and we find no ground for reversal in the circumstances. Any other answer to these contentions would produce little less than anarchy.
>
> * * *
>
> Law enforcement and fair trial for those accused of violations is not to be limited to the pattern chosen by defendants. The administration of criminal justice in the federal courts will not be delivered into the hands of those who could gain only from its subversion. Our decision in Aviles is as applicable to a trial of two defendants as it is to a trial of fourteen. It may take two to conspire but it takes only one to throw a chair at a prosecutor.
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> * * *
>
> In view of the unprecedented tactics employed to impede the continuance and resolution of this trial,

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[15] See *United States* v. *Bentvena, supra,* 288 F. 2d 442 (Chief Judge Lumbard, Judge Waterman and Judge Madden, United States Court of Claims, sitting by designation); *United States* v. *DiPietro, supra,* 302 F. 2d 612 (per curiam) (Judges Friendly, Smith and Marshall); *United States* v. *Bentvena, supra,* 308 F. 2d 47 (Chief Judge Lumbard); *United States* v. *Galante, supra,* 308 F. 2d 63 (Judge Kaufman); *United States* v. *Panico, supra,* 308 F. 2d 125 (Judges Moore and Smith, Judge Friendly dissenting), *vacated and remanded,* 375 U. S. 29; *United States* v. *Bentvena, supra,* 319 F. 2d 916 (Judges Moore, Smith and Hayes).

> we find that the actions and rulings of the trial judge were reasonable and often necessary to prevent the frustration of justice." [16]

At the end of the trial, we held eleven defendants, including both petitioners, in contempt for their misconduct. Most of the contempts were clear and the sentences short, resulting in expeditious appeals.[17] All convictions, except Salvatore's, were either dismissed as moot or affirmed on July 20, 1962.[18] Decision as to Salvatore was reserved, however, until September 14, 1962, when his conviction was affirmed, Judge Friendly dissenting. The Supreme Court, Mr. Justices Clark and Harlan dissenting, reversed Salvatore's contempt conviction and remanded it for a plenary hearing on the issue of his competence to form the requisite criminal intent.

The confines of this opinion precludes even an outline of the machinations that fill nearly 10,000 pages of transcript and more than 500 exhibits, including over 200 court exhibits, produced on this ten-week trial. We think, however, that the above summary demonstrates why the issues raised here cannot be resolved without regard to the context of the entire trial and appellate proceedings.

The allegedly insane trial conduct of Salvatore, postviction psychiatric data respecting him, and the Supreme

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[16] *United States* v. *Bentvena, supra,* 319 F. 2d at 931-32.

[17] Salvatore's petition for a writ of certiorari, p. 4, complains that the record was so inadequate that a meaningful review was impossible.

[18] *United States* v. *Bentvena, supra,* 304 F. 2d 883.

Court's reversal of his summary contempt conviction for a hearing on his capacity to form a criminal intent form the basis of petitioners' claims.

Before detailing Salvatore's trial conduct, we note that most of the conduct portrayed in the supporting affidavits occurred in the absence of the jury. Petitioners also view Salvatore's conduct in a vacuum out of the context of the parallel conduct of ten of his co-defendants, including petitioners, and the popularity of the insanity claim during trial.[19] We turn now to the particular facts.

As noted earlier, on the morning of trial, the Panico's counsel, Mr. Aronne, although retained on September 6, 1961, was engaged in another trial which was expected to last for one week (Tr. 598). Applications for still further adjournments were denied. Over the Panicos' objection, the court assigned George Todaro, Esq., who had been through the first trial, to represent them and defendant Loicano until their retained counsel returned or they obtained other counsel (Tr. 598, 604-616).[20] We directed the prosecution not to put in evidence directly relating to the Panicos or Loicano until their retained counsel returned. The prosecution obeyed.

While the jury was being empanelled, Salvatore started the torrent of disruptive outbursts which plagued the trial. He shouted:

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[19] See similar claim in *Mirra* v. *United States, supra,* 255 F. Supp. 570.

[20] The appointment was challenged by mandamus, and the writ was denied. *Loicano* v. *MacMahon, supra.*

Appendix B

> "Do these people know I don't have a lawyer? What is this, Russia? There's nobody representing me here." (Tr. 58-59.)

A few minutes later, referring to Mr. Tadaro, he shouted:

> "I don't want to talk to him. I am not going to talk to him, I paid a lawyer. I won't talk to you." (Tr. 123.)

The court specifically instructed the panel of veniremen to disregard both outbursts and not to draw any inference against any defendant. We also talked with both Panicos out of the presence of the jury and in the presence of their assigned counsel. At that point, Salvatore calmly and coherently insisted that he did not wish to be represented by Mr. Todaro but was eager instead to continue with Mr. Aronne (Tr. 189-193a).[21] We explained

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[21] The Panicos' attitude toward Mr. Aronne varied markedly in inverse proportion to his availability. Before trial, on March 12, 1962, Mr. Aronne sought to withdraw, representing that he was inexperienced in federal practice and had been engaged only to answer the calendar until such time as the Panicos were financially able to retain Jerome Lewis, Esq. (counsel on the present application) (Pretrial Tr. 67-68). The application was denied as untimely. Mr. Aronne had been admitted to the bar since 1952, and half of his practice was criminal (Pretrial Tr. 68-71). Salvatore confirmed the retainer in the terms stated by Mr. Aronne. He added that Mr. Aronne lacked ability to handle his case and wished additional time to get another lawyer, perhaps someone from Legal Aid (Pretrial Tr. 73-74). We advised that he could substitute any attorney any time, but that the trial would not be delayed for that purpose, and rejected as untimely his request that another lawyer be assigned (Pretrial Tr. 76).

that Mr. Todaro was an able and experienced lawyer familiar with the case, that Mr. Aronne would return by the end of the week, and that the vital stage of the case would not be reached until then.

Except for the two incidents mentioned, there were no further disturbances by Salvatore in the presence of the jury until sixteen days later, on the morning of April 18, when he simply advised the court that his lawyer, Mr. Aronne, had arrived in court (Tr. 1937). There was then no further misbehavior by him in the presence of the jury for over a month. Then, on the afternoon of Wednesday, May 23, 1962, after a brief recess, just as the judge entered the courtroom, he stepped into the jury box, walked along the inside of the rail, pushed the jurors in the front row, and screamed:

> "Get out of here. The Judge has got me guilty. Big John, Joe B, they are the junk pushers. We're innocent. My brother and I, we haven't got anything to do with this thing. They have me in jail already. Do you understand me? They have us in jail for nothing. They got us in jail. Twenty years they want to give me.
>
> The Court: (To the deputy marshals) Take him out of here.
>
> Defendant Salvatore Panico: Twenty years, for nothing. Ruined for life. For what? Ruined for life. For what?" (Tr. 5638.)

The marshals removed Salvatore from the courtroom and, then, not to be outdone, petitioner Carmine Panico chimed in:

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"I want to see my brother.

The Court: Sit down.

The Clerk: Be seated.

The Court: Carmine Panico, you may go back in here (pointing to the cell block behind the courtroom) and see him when he calms down.

Defendant Carmine Panico: ([* * * To the Court]) You think that he's all right. What you're doing, it is a shame, it ain't fair, to allow a frame. A lousy bum like that. [* * * Pointing to the Court.] A shame in your heart that you stand up there near the flag which I served for.

The Court: (To the deputy marshals) Take him in back [the cell block].

Defendant Carmine Panico: [* * * Pointing to Court and Prosecutor] It is a dirty shame what you are doing, to ruin families, you bastards." (Tr. 5639.)

Carmine Panico was also removed from the courtroom (Tr. 5639a). The court immediately instructed the jury as follows:

"Ladies and gentlemen, I must tell you now that despite that, we are all under a duty here to see that every one of these defendants get a fair trial, including Salvatore Panico and his brother Carmine, and you must disregard it. As I have told you many times, this case must be decided on the evidence and on nothing else but the evidence, and Salvatore Panico's conduct or his brother's is not evidence, and you must not let it influence you in determining the guilt or innocence of any defendant, particularly the two Panicos." (Tr. 5640.)

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The jury was then excluded and motions by all defendants for a mistrial and for a severance on the ground that the incidents had prejudiced their right to a fair trial were denied (Tr. 5657-5661). The jury was recalled and further instructed:

> "Ladies and gentlemen, we are about to recess. I ask you, as calm and intelligent and dispassionate human beings, as fair impartial people to put that incident out of your minds and don't let it prejudice you against any defendant in this case, particularly the ones who are involved." (Tr. 5662.)

The next day, Thursday, May 24, 1962, to avoid agitation of the defendants and the constant delay and interruption of the trial created by a barrage of motions, we directed all counsel to reserve all motions, including those for a mistrial, until the close of the day. Mr. Aronne, immediately flouting our instruction, applied for psychiatric examinations of both Panicos claiming they "were both a little balmy" (Tr. 5679). Shortly after this application, during testimony of a witness, Mirra, who also claimed insanity, and Salvatore joined in the following disruption:

> "Q. Do you know a person named Anthony Mirra? A. Yes, I do.
>
> Q. Do you see him in the courtroom? A. There he is over there, the third from the right.
>
> The Court: He happens to be the fifth from the right, but I will take it. Let the record reflect he identified Mirra after he stood up.
>
> Defendant Mirra: Let the record reflect he can't see over here.

Appendix B

Q. I direct your attention—

The Court: Take him out.

Mr. Luney: What was your Honor's' direction?

The Court: Remove Mirra from the courtroom.

(The marshals escorted defendant Mirra from the courtroom.)

Mr. Cosentino: This demonstration, your Honor, I ask for the withdrawal of a juror and for a mistrial.

Mr. Peluso: I join in that motion.

The Court: Denied. Proceed.

Mr. Krieger: This puts me in a particularly difficult position.

The Court: Proceed.

Mr. Krieger: I am proceeding in an empty fashion.

The Court: Proceed.

Mr. Luney: May the record reflect that the witness from where he is sitting cannot see the two people who are sitting at the end of the table?

The Court: He can see if he stands up. He may stand up.

Defendant Salvatore Panico: Let the record reflect that he can see the good-looking Carlie and the other punk there—the other good-looking pushers there.

The Court: Take him out.

Defendant Salvatore Panico: Yes, take me out.

Mr. Peluso: I move for a mistrial.

Mr. Luney: I join in that.
The Court: Denied.

(The marshals escorted defendant Salvatore Panico from the courtroom.)" (Tr. 5706-5708.)

As the foregoing shows, despite our instructions the fracas was followed by a disrupting course of motions for a mistrial. We denied them and again instructed the jury to disregard the outbursts (Tr. 5708, 5869). Mr. Aronne, counsel for the Panicos, and Mr. Krieger, counsel for DiPietro, made motions for a psychiatric examination of Salvatore. The applications were again denied, for, among other signs of rationality, it was plain from the very contents of Salvatore's outbursts that he was attentive and knew what was going on in the courtroom (Tr. 5724-25, 5873-76).

The next day, Friday, May 25, 1962, during the first five minutes of testimony, the following occurred:

"Defendant Salvatore Panico: DiPietro is talking about me there. He is the convicted dope pusher. Separate me from him.
Defendant DiPietro: Stop him. I told you, Al.
Mr. Krieger: I move for a mistrial as far as DiPietro is concerned." (Tr. 5889.)

DiPietro responded:

"Defendant DiPietro: Every one of my witnesses, he made a holler.
Mr. Tendy: May the jury be excused?
The Court: The jury is excused. I will say as you go out you must ignore these outbursts.

Appendix B

(Jury left the courtroom.)

Defendant DiPietro: I never made a sound all this time. If he comes into this courtroom when I am here, I will strangle him. He interrupted my seven witnesses. Chain him down, if you got to.

• • •

Mr. Krieger: My client wishes to address the Court himself. May he do it here and now?

The Court: No, he may not. You speak for him. You have been speaking very well.

Defendant DiPietro: Yes. I will strangle him myself, I will get him out of the courtroom." (Tr. 5890-93.)[22]

After this incident, DiPietro's counsel moved for a mistrial, all defendants joined, and we denied the motion (Tr. 5889-5893).

On further application of defense counsel, pursuant to 18 U.S.C. § 4244, the court ordered a psychiatric examination of Salvatore to determine whether he was mentally competent to stand trial (Tr. 5889-5895). Dr. Vitold Arnett, a psychiatrist, was summoned to the courthouse and there briefly interviewed Salvatore. Dr. Arnett reported

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[22] DiPietro's threat to strangle Salvatore demonstrates that Salvatore's complaint to examining psychiatrists that his life was being threatened by DiPietro and other defendants at the detention center was not a delusion but an actual fact. Those psychiatrists, who thought him to be suffering from paranoia, believed these threats and similar objective facts found in this record were delusions. That erroneous belief undermines their conclusion.

to the court that Salvatore was "not capable of undergoing a trial at this point" (Tr. 5906). The trial was recessed for the day.

On Monday morning, May 28, the recess was continued until May 31, and, pursuant to the command of 18 U.S.C. § 4244, Salvatore was ordered taken to Bellevue Hospital for a thorough psychiatric examination as to his mental competence to stand trial, and Tuesday, May 29, was set for a hearing on that question. The court appointed Dr. George Hyslop, a well-qualified psychiatrist,[23] to conduct the examination along with Dr. Arnett. Mr. Aronne engaged Dr. Theodore S. Weiss (Tr. 5950-55).

Dr. Hyslop examined Salvatore on both May 28 and the morning of May 29. Dr. Arnett also examined him on the morning of May 29, as well as on May 25, shortly after his outburst. Dr. Weiss examined him on the morning of May 31 (Tr. 6023). All three psychiatrists testified at the hearing. Drs. Hyslop and Arnett testified at

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[23] Bachelor of Arts 1913; Master of Arts in psychology 1914; teaching fellow in psychology at Indiana University; medical school Cornell University 1915-19; licensed 1919; practiced neurology and psychiatry since 1922; served at Bellevue Hospital as neurologist and taught neurology at Cornell 1923-33; neurologist and psychiatrist at Memorial Hospital from 1923 until retirement in 1958; served in Neurological Institute from January 1922 until retirement in 1958; examiner of the American Board of Psychiatry and Neurology; served in the Naval Reserve from 1934 until retired in 1942 and in the Veterans Bureau as a psychiatrist and neurologist from 1922 to 1927; impartial panel expert in neurology and psychiatry for the New York State Workmen's Compensation Board; consultant to the United States Department of Labor in neurology and psychiatry; author of thirty-five articles and two textbooks (Tr. 5958-5960).

the hearing that Salvatore understood the nature of the charge against him, that he was able to discuss the facts with his lawyer, that his speech was clear and coherent, and that he was able to understand what the witnesses were saying and discuss the facts with counsel (Tr. 5968-69, 5998-99). Dr. Weiss testified that Salvatore was paranoid[24] and did not "comprehend fully" the proceedings *against him (Tr. 6026). All agreed that there was no* history of mental illness of any kind. On the basis of this testimony, the demeanor of the experts on the stand, and our own observation of Salvatore[25] and his co-defendants over a period of ten weeks, we found that Salvatore was competent to stand trial (Tr. 6045). A motion by Salvatore's counsel to sever him was denied (Tr. 6049).

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[24] Dr. Weiss gave as the basis for his diagnosis that Salvatore was suffering from delusions of persecution, to wit, that he was "framed," was the innocent victim of a "stool pigeon," and had been threatened with strangulation by DiPietro and the other defendants who were members of the "Black Hand" ("Mafia"). We heard DiPietro's threats. Moreover, every defendant claimed innocent "frame-up" and that the government's principal witness was a lying "stool pigeon." We could not credit the testimony of Dr. Weiss or Dr. Arnett, even if we had been otherwise impressed by them, because what they said were delusions were objective realities.

[25] Throughout the trial, Salvatore cannily and articulately sought to manipulate his counsel situation. Because of this, we spoke to him directly in the robing room several times. (See Pretrial Tr. 73-76, 616-18; Tr. 189-193a, 304-305a, 620-624, 3517-3520; 3579-3583.) The timing and content of his outbursts were patently designed to arouse the greatest prejudice in the fewest words against co-defendants higher than he was in the hierarchy of the conspiracy.

Appendix B

At the conclusion of the hearing, the court warned Salvatore that any further outbursts would force the court to have him gagged.

On May 31, 1962, the trial was resumed, and Salvatore again disrupted the proceedings with an outburst directed, this time, at defendant Galante. He was again removed from the courtroom (Tr. 6083). The court ordered that he be gagged and shackled to restrain him from any further outburst or other disruptive conduct in the courtroom. During the remainder of the trial, he remained gagged and shackled, and there were no further incidents in the presence of the jury.

Thwarted in the courtroom, Salvatore's disrupting misconduct continued offstage in the Federal House of Detention. He twice made attempts at suicide, each time in the midst of others, under circumstances which made success impossible. In the early morning hours of June 7, he was found in his cell, which he shared with his brother Carmine and two others, hanging with a belt around his neck. He was released by a prison guard and one of his cellmates, who was holding him up when the guard arrived on the scene a few seconds after Salvatore had kicked the chair out from under him. He was never unconscious and suffered no ill effects. He conversed coherently with the guard and had full use of his faculties immediately after the incident (Court's Exh. 150-A; Tr. 6971-6981).

On Friday morning, June 8, at about 8:50 A.M., Salvatore entered the shower room at the detention center with his brother Carmine and several other prisoners. At about 8:55 A.M., a senior correction officer heard a commotion and found Salvatore writhing on the floor of the

shower room. He was bleeding from fourteen evenly-spaced shallow cuts he had inflicted on his forearms with a razor blade (Tr. 7181-84). Taken to St. Vincent's Hospital at about 9:30 A.M., he was given first aid. His loss of blood was small. He was bandaged and returned to the detention center by noon in good physical condition (Court's Exhs. 188 and 205). Again the trial was recessed for the day.

On June 18, 1962, the Court of Appeals, on application of the defendants, directed another psychiatric examination of Salvatore's competence to stand trial. He was examined again by Dr. Hyslop, who reported, in response to seven specific questions submitted by the court directed to the question of Salvatore's competence to stand trial and, mindful that contempt was in the offing, to his competence to form a criminal intent, that Salvatore was able to: (1) understand that he was charged with a violation of the narcotics laws, (2) understand what the witnesses were saying, (3) discuss the facts with his lawyer with a reasonable degree of rational understanding, (4) communicate with clear and coherent speech, and (5) remember events clearly. In response to our *McNaughton* questions, he further stated (6) that Salvatore was conscious of the nature and quality of his acts and (7) capable of distinguishing between right and wrong (Court's Exh. 205, pp. 9-10). On the basis of the report, earlier testimony, and our own observation of Salvatore's rational behavior, we found not only that he was competent to stand trial, but also that he was capable of forming a criminal intent.

After every one of the outbursts by Salvatore and others, we instructed the jury to disregard them and not

consider them against any defendant in any way. When it became clear that Salvatore, his brother, and Mirra would continue to flout our orders and disregard the trial, despite our warnings against any further disturbances, the court directed that they be gagged and shackled to prevent prejudicial outbursts or conduct directed at other defendants. We even went to the extreme of preventing Salvatore from taking the stand, not because we thought him insane or were unaware of a defendant's usual right to testify in his own behalf (18 U.S.C. § 3481), but because it was perfectly clear, as his own words show whenever the gag was removed (Tr. 8256-8270), that he planned to use the witness stand as a stage for irrelevant, inadmissible and prejudicial accusations against co-defendants, just as Mirra did earlier, set the stage for a mistrial, reversible error, or plant a basis for collateral relief. Finally, the court's charge strongly and unequivocally instructed the jury:

> "As I have repeatedly instructed you throughout this trial, misconduct and outbursts, disturbances and remarks by any defendant on such occasions are not evidence and are not to be considered by you in determining the guilt or innocence of such defendant or any other defendant in this case. Nor are you to draw any inference against any defendant or be influenced in any way by any measures which the court has taken to insure the orderly conduct of this trial. Such matters are not evidence, and you must put them entirely out of your mind. The orderly conduct of the trial and the measures necessary to insure it are the exclusive responsibility of the Court. They are no part of your function. You are, therefore, to draw no in-

ference against any defendant from the Court's actions in that regard.

* * *

What the law requires, then, is calm, cool and deliberate consideration of the evidence. The law does not permit you to be governed by guesswork, passion, fear, favor, prejudice, public opinion, the nature of the charge, the remarks, outburst or conduct of any defendant during the trial, or by anything other than a fair and impartial consideration of the evidence." (Tr. 8714-17.)

Having reviewed the record, we turn to the contentions made here.

As we noted above, the entire thrust of the present § 2255 petition is an attempt to show that Salvatore's conduct at trial was the result of either insanity or uncontrollable emotional impulses. Petitioners contend that if their supporting papers raise an issue of fact as to the uncontrollability of Salvatore's conduct, an evidentiary hearing must be held, and if their contention is established they are entitled to relief under § 2255. They are mistaken.

Cutting through the clutter of distortions, half-truths, opinions, conclusions and sophistical arguments presented in petitioners' voluminous papers, the material question on this application is not whether Salvatore was sane or insane during trial, but whether his conduct deprived petitioners of a fair trial.[26] The focus of the inquiry is, thus,

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[26] See *United States* v. *Aviles*, 274 F. 2d 179 (2d Cir.), *cert. denied*, 362 U. S. 974 (1960).

not on the cause of Salvatore's misconduct, but on its effect upon petitioners' rights. Whether Salvatore's behavior was deliberate and calculated or involuntary and uncontrollable is, therefore, irrelevant to the question of the effect of his behavior on the jury and the adequacy of the trial court's measures and instructions to preserve the proper atmosphere for thoughtful deliberation.

Even if every allegation in petitioners' papers as to Salvatore's mental or emotional state during, or since, trial were accepted as true, nothing would be established which would entitle petitioners to relief. We conclude, then, that the contention that Salvatore was so mentally ill or emotionally disturbed during trial that he was unable to control his conduct, which petitioners' voluminous papers are intended to support, is irrelevant to the ultimate legal question of whether petitioners received a fair trial. This finding is sufficient by itself to deny this application without a hearing, but, for the sake of completeness, we will consider petitioners' other arguments.

The material question on this claim that petitioners were denied a fair due process trial is: Did the trial judge deal adequately with the situation of possible prejudice under all the circumstances of this trial? Petitioners squarely raised that searching question on direct appeal. The Court of Appeals gave thorough consideration to it, scrutinized the record, and held that, in light of the circumstances and the history of the prior trial, the court did everything in its power to minimize the effects of the disruptive conduct and outbursts of Salvatore and others, including both petitioners, and that these steps were sufficient to protect the rights of the other defendants, including these petitioners.[27] Moreover, the identical claim

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[27] *United States* v. *Bentvena, supra,* 319 F. 2d at 930-31.

raised here, that Salvatore was so mentally ill during the trial that his continued presence and conduct prejudiced petitioners' rights to a fair trial, was raised on direct appeal, thoroughly considered, and rejected by the Court of Appeals even though, as we shall see, the allegedly new information now proffered was then before the Court of Appeals. It is worth reiterating what the Court said about this tired old claim of an unfair trial:

> "All appellants, even the perpetrators, complain of the prejudicial effect of the outbursts of the defendants. * * *
>
> As to his [the trial judge's] failure to sever certain defendants and to declare a mistrial after these outbursts, we look to our recent decision in United States v. Aviles, supra. There, as here, a defendant burst into a tirade before the jury accusing his co-defendants. There, as here, the trial judge promptly instructed the jury to disregard the outbursts. We said, in answer to the contention that reversal was required:
>
> 'Manifestly it was not error to deny the mistrial motions. If such conduct by a co-defendant on trial were held to require a retrial it might never be possible to conclude a trial involving more than one defendant, it would provide an easy device for defendants to provoke mistrials whenever they might choose to do so. Under all the circumstances the trial judge's instructions adequately dealt with the situation and his denial of the mistrial motions was proper.' 274 F. 2d at 193.

Appendix B

This case differs from Aviles only in that the outbursts of the defendants were more numerous and more offensive. But the trial judge instructed the jury to ignore the outbursts each time they occurred. This is all that he could do apart from taking steps to prevent their repetition. We have satisfied ourselves that the prosecution did not provoke the incidents. The judge did all in his power to minimize their effect, and we find no ground for reversal in the circumstances. Any other answer to these contentions would produce little less than anarchy.

* * *

Appellants claim that the trial judge should have severed each offending defendant after an outburst. Why this course of action was required we fail to see. After the incident had occurred, severance would not have protected the remaining defendants from any possible prejudice. It would simply have afforded each defendant an easy escape from the trial. Appellants insist, however, that Salvatore Panico should have been severed because even if he were competent to stand trial, he was so mentally ill during the trial that his continued presence and conduct prejudiced the rights of the other defendants to a fair trial. Their claim is that even if prejudice resulting from the outbursts could not have been erased, the judge was obligated to sever Salvatore Panico after it became apparent that he could not control himself and that other outbursts would be forthcoming.

Rule 14 of the Federal Rules of Criminal Procedure provides for an exercise of discretion by the

trial judge as to whether, at any point in the trial, there appears to be a possibility of sufficient prejudice to any defendant to warrant a severance * * * and the exercise of that discretion will be corrected only if abused. * * * We have recently had before us the contention that Salvatore Panico could not be punished for contempt because he 'was too mentally ill to formulate the intent to be contumacious.' * * * We there quoted at length from the trial judge's certificate filed pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure and concluded as follows: 'We do not think that the conclusion of Judge MacMahon with respect to the deliberate and calculated nature of defendant's acts constitutes reversible error.' * * *

Accepting that conclusion here, little remains of appellants' claims that the trial judge abused his discretion in failing to sever Panico. The trial judge found, from his own extensive observation of Panico, and from the reports of psychiatrists that examined him, that Panico's acts were deliberate and calculated to disrupt the trial. This being so, he stands in no different position than the other unruly defendants and, as we have said, there was no abuse of discretion in refusing to grant a severance because of their actions." [28]

The Supreme Court denied certiorari.[29]

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[28] *Id.* at 930-32.

[29] 375 U. S. 940.

Appendix B

In light of the clear disposition on direct appeal of both the general and particular claims now asserted, petitioners are barred from raising them again in a § 2255 proceeding. "It is well settled law that § 2255 cannot be * * * employed to relitigate questions which were raised and considered on the appeal."[30] Recognizing that principle of law and even conceding that the ultimate issue here is "identical to one which was litigated before Judge MacMahon and the reviewing court,"[31] petitioners, nonetheless, argue that they are entitled to relief under § 2255 because of allegedly new facts which were neither before the trial court nor appellate courts.

What, then are the allegedly new facts? First, petitioners claim that after his conviction Salvatore was diagnosed a schizophrenic by a psychiatrist at Sing Sing Prison on July 12, 1962 and was committed to Dannemora State Hospital by order of a County Judge of Westchester County on August 22, 1962.[32] Assuming the truth of these allegations, they are of no help to petitioners. True, this data was not before the trial court, but, at best, it would have been cumulative expert opinion. Correspondence asserting the claim was nevertheless filed with petitioners' papers on direct appeal and distributed to the panel.[33] Moreover, it was stated as fact in petitioners'

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[30] *Castellana* v. *United States*, 378 F. 2d 231, 233 (2d Cir. 1967).

[31] Lewis Affidavit, p. 4.

[32] Salvatore was returned to Sing Sing Prison after his conviction in this court to continue service of a state court sentence.

[33] Appendix (Supplemental) on behalf of appellants Salvatore Panico and Carmine Panico, pp. 141a-146a.

briefs on appeal and argued by both petitioners and the government.[34] It is thus untenable for petitioners to contend that it was not considered by the Court of Appeals. Moreover, nine months earlier, in his dissent on Salvatore's appeal from his contempt conviction, Judge Friendly refers to the "fact, communicated to us by counsel after the argument, that the psychiatrist at Sing Sing Prison and two others have now diagnosed Salvatore as schizophrenic * * *."[35] Thus, there is no merit to the claim that the proffered post-conviction psychiatric data is new or that it would in any way warrant relitigation or change the result of the rejected claim that Salvatore's continued presence and conduct at trial prejudiced the rights of petioners to a fair trial. The second allegedly new fact is an argument that because the Supreme Court reversed and remanded Salvatore's contempt conviction for a plenary hearing on his capacity to form a criminal intent, the Court of Appeals' earlier affirmance of petitioners' conviction on the indictment has been undermined. The argument is based on the fact that in the contempt case the Court of Appeals accepted our finding that Salvatore was sane in rejecting petitioners' claim that they were denied a fair trial. As we have seen, assuming that Sal-

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[34] Brief for Carmine Panico and Salvatore Panico, p. 41; Brief for Carlie DiPietro, p. 28; Government's Brief, p. 96 n. 2.

[35] *United States* v. *Panico, supra*, 308 F. 2d at 129. The fact shown by the actual records is that the diagnosis of schizophrenia, paranoid to psychosis, was tentative and incorrect. It was later downgraded to psychopathic personality, depressed episode. The patient recovered and was found suitable to return to prison on September 17, 1963.

vatore was insane, the argument is of no help to petitioners, for the material question on whether petitioners received a fair trial is not the cause, but the effect, of Salvatore's conduct. In any event, the appellate history as a whole shows that the argument is untenable.

On June 13, 1963, the Court of Appeals affirmed petitioners' conviction. It rejected, *inter alia,* petitioners' claim that Salvatore was so mentally ill that his continued presence and conduct deprived them of a fair trial. In doing so, it referred to its earlier acceptance, on Salvatore's appeal from his contempt conviction, of our finding that he was sane.[36]

Nine months earlier, on September 14, 1962, the Court of Appeals, one judge dissenting, had affirmed Salvatore's conviction for contempt. There, the court, quoting our certificate, noted *inter alia* that: "A psychiatrist examined him and found him sane in all respects." The certificate also included our express finding that: "There is nothing insane about this man whatever." The majority, although aware from counsel's correspondence of the alleged post-conviction diagnosis of schizophrenia, accepted our finding that Salvatore was sane and that his acts were wilful and deliberate.[37] Our finding of sanity and wilful conduct was not based solely upon the testimony of psychiatrists, given at a hearing held in May, which was directed to the different question of Salva-

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[36] 319 F. 2d at 932.

[37] *United States* v. *Panico, supra;* 308 F. 2d at 127.

tore's competence to stand trial,[38] but upon parts of that testimony, on our own observation of Salvatore over a period of twelve weeks, and on the written opinion of Dr. Hyslop, given in June, that Salvatore knew the nature and quality of his acts and was capable of distinguishing between right and wrong.[39] However, no hearing or tes-

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[38] According to the dissent:

> "He [the trial judge] places emphasis, as my brothers seem to do, on the testimony of the psychiatrists concerning Salvatore's ability to stand trial; the very fact that he found it necessary to rely on such evidence seems to show his belief that something beyond what he saw or heard appellant do was essential to conviction here." *United States* v. *Panico*, *supra*, 308 F. 2d at 129.

The dissent continued in a footnote that, although the same conclusion (lack of power) would be reached "if the facts were otherwise, it should be pointed out that the testimony of the psychiatrists was directed to an issue wholly different from that relevant to appellant's guilt of contempt.

[39] In reply to seven specific written questions asked by us on June 18, 1962, pursuant to a writ of mandamus issued by the Court of Appeals, Dr. Hyslop, a court-appointed psychiatrist, concluded in writing on June 19, 1962 not merely that Salvatore was capable of standing trial, but also that he knew the nature and quality of his acts and was capable of distinguishing between right and wrong (Court's Exhs. 188 id. and 205 id., p. 10). We sought that opinion because we knew that summary contempt was in the offing. On July 5, Salvatore and ten others were convicted of contempt. We did not expressly refer to Dr. Hyslop's opinion in our certificate but stated our finding in conclusory terms that Salvatore was "sane in all respects." Twelve days later, on July 17, the appeals from the contempt convictions were argued. Neither the government nor the court ever mentioned Dr. Hyslop's report or the facts which it supports, although it was reproduced in Salvatore's Appendix.

timony was ever taken on the issue because we acted under the summary contempt power expressed in Fed. R. Crim. P. 42(a), which, as the majority opinion notes, says nothing about a hearing. Nevertheless, in October 1963, the Supreme Court (Mr. Justices Clark and Harlan dissenting) reversed Salvatore's contempt conviction and remanded the case for a plenary hearing under Fed. R. Crim. P. 42(b) to determine whether Salvatore was criminally responsible for his conduct.[40] In the interim between its opinion affirming Salvatore's contempt conviction and the Supreme Court's reversal, the Court of Appeals affirmed petitioners' conviction on the indictment. In doing so, it rejected the argument that Salvatore was "so mentally ill during trial that his continued presence and conduct prejudiced the rights of the other defendants to a fair trial," giving as one reason its recent rejection of the "mental illness" argument on Salvatore's contempt appeal.

Seizing on that fact, petitioners argue that the Court of Appeals' rejection of the "mental illness" argument and affirmance of their conviction has been undermined. There are a number of reasons why the argument is without merit.

First, it is clear from a reading of the Court of Appeals' opinion affirming petitioners' conviction that its reason for holding that Salvatore's misconduct did not deprive petitioners of a fair trial was that the trial judge's instructions and measures adequately protected the defendants' rights.[41]

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[40] 375 U. S. 29.

[41] *United States v. Aviles, supra.*

Second, the Court of Appeals' reference to its recent rejection of the "mental illness" claim was unnecessary to decision because, as we have seen, the contention is irrelevant to the issue of a fair trial.

Finally, the point was urged unsuccessfully in petitioners' application for certiorari. There, petitioners raised the same issue proffered here—that Salvatore was so mentally ill during trial that his continued presence and conduct prejudiced their rights to a fair trial.[42] Again they filed the correspondence respecting the prison diagnosis of Salvatore as a schizophrenic and his commitment to Dannemora State Hospital.[43]

In an effort to relitigate this tired issue, petitioners contend that the Supreme Court was misled by the Solicitor General in his brief opposing their application for certiorari. We find no substance to the charge. The Solicitor General, this time, did not simply demur to the hearsay correspondence filed by Mr. Lewis because it did not appear in the record, as he had on the earlier con-

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[42] See DiPietro's Reply Brief on application for certiorari, p. 2, § 4, October Term, 1963, No. 346. See also Carmine Panico's Reply Brief on application for certiorari, p. 1, October Term, 1963, No. 346.

[43] See DiPietro's petition for certiorari, pp. 26-28; Carmine Panico's petition for certiorari, p. 20.

tempt case.[44] Rather, he took pains to look at the official records and filed all of them with the Supreme Court. His brief noted correctly that:

> "the diagnosis of schizophrenia was tentative; that, on fuller examination, the New York authorities have concluded that schizophrenia was not a correct diagnosis; and that Panico was, on September 17, 1963, found suitable for return to prison."[45]

Petitioners contend that the Solicitor General's statement was a distortion of the psychiatric record because it omitted to point out that the diagnosis had been changed to

> "Psychopathic Personality,
> Depressed Episode."

They argue that this "distortion" may not have been discovered by the Supreme Court because the prison medi-

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[44] Apparently the only post-conviction data which the Court of Appeals and the Supreme Court had on Salvatore's appeal from his contempt conviction was hearsay in the form of correspondence injected into Salvatore's Appendix by his counsel, Jerome Lewis, now counsel for these petitioners. The correspondence was not only hearsay but also did not appear in the trial record. It stated that Salvatore had been diagnosed by a prison and two court-appointed psychiatrists as a schizophrenic and had been committed to Dannemora State Hospital. The actual records, however, show that at that time the diagnosis was only tentative, later found incorrect and downgraded to psychosis with psychopathic personality. (See Lewis Affidavit, Exh. D.) The Solicitor General simply argued that the post-conviction events were not part of the record, that the government was not a party to them, that it had no opportunity to inquire ino them, and that the court should therefore disregard them. (Salvatore Panico's petition for certiorari, October Term, 1962, No. 633; Brief for the United States in opposition, p. 21.)

[45] Lewis Affidavit, p. 64.

cal records, which were submitted by the government, may have been illegible, and that the court may thus have been misled as to the seriousness of Salvatore's mental condition. The argument is frivolous. Such speculation affords no basis for the relief sought here. Moreover, as the Solicitor General noted in his reply to the charge of deception raised by DiPietro's then counsel, Salvatore's mental condition, if relevant at all, was at best peripheral, the government's summary was literally accurate and correct, the New York authorities did conclude that schizophrenia was not a correct diagnosis, Salvatore was found suitable to return to prison, the exact text of the full clinical summary was filed with and available to the court, if any Justice wanted it, and the issue was thoroughly probed by the Supreme Court.[46]

We have given thorough consideration to the full clinical report. The exact text of the pertinent part of the records bears out the Solicitor General.[47] We conclude that the Supreme Court was not misled.

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[46] See Lewis Affidavit, Exh. E.

[47] "July 12, 1962: Tentative Diagnosis: Schizophrenia, paranoid type." (Lewis Affidavit, Exh. D: report of Dr. Norbert S. Bruckman, dated July 12, 1962, to Louis J. Kelley, Acting Warden, Sing Sing Prison.)

"September 17, 1963: He is in good contact, he shows no evidence of any symptoms suggesting Schizophrenia which was the original impression. Today at Staff his ward physician as well as the Staff and psychologists, whom he had in group therapy and recently gave psychological test, which failed to reveal any evidence of Schizophrenia, expressed the idea that the patient has Psychopathic Personality and has not seen any evidence of Schizophrenia. Accordingly, the patient's diagnosis is changed from Schizophrenia, Paranoid to Psychosis with Psychopathic Personality, Depressed Episode. The patient has recovered and is found suitable to return to prison." (Lewis Affidavit, Exh. D: Dannemora State Hospital Clinical Summary, dated September 25, 1963, p. 4.)

Appendix B

The final item of allegedly new evidence is an affidavit by Dr. Jay Katz, a psychiatrist retained by petitioners for the purpose of this application. Dr. Katz asserts that Salvatore was "helpless to control his conduct" during the 1962 trial by reason "of largely unconscious psychological forces which dominated his mind" and that his behavior was "at least akin to that of psychotic persons with paranoid tendencies." His opinion is based on a reading of various parts of the trial transcript and exhibits, on reports from psychological tests conducted in late December 1966, and on three and one-half hours of psychiatric interviews with Salvatore, held in late December 1966 and early January 1967.[48]

Dr. Katz's findings, however, are not in any meaningful sense new evidence. There were psychiatric reports and testimony during the trial by both Dr. Arnett and Dr. Weiss which reached essentially the same conclusion (Tr. 5906, 6032). Dr. Katz's report, then, is merely cumulative. It simply reiterates an expert opinion that was already considered by both the trial and appellate courts in this case.[49] The probative value of the report is also questionable, considering that it was based on only three and one-half hours of interviews with Salvatore four and five years after the conduct in question, and on a reading of the other reports and portions of the record. During the trial, Dr. Hyslop examined Salvatore on three occasions and noted in his report (Court's Exh. 188 id.):

> "The selections from the trial record, citing instances of defendant's behavior during trial, are in my

[48] Katz Affidavit, pp. 5-6.

[49] See *Dirring* v. *United States*, 353 F. 2d 519 (1st Cir. 1965).

> opinion of little value in determining whether or not the conduct was a product of mental disorder."

We thus conclude that the issue raised here has been raised and decided on direct appeal and that petitioners are prejudiced from raising it in this § 2255 proceeding. We find nothing in the supporting papers offering any new evidence not presented to the reviewing courts on the direct appeals by these petitioners. Finally, we hold that the cause of Salvatore's behavior during trial, the question to which petitioners' voluminous papers are addressed, is irrelevant to the question of whether petitioners Carmine Panico and Carlie DiPietro received a fair trial.

This brings us to the motion to disqualify this court from considering this § 2255 application. Title 28 U.S.C. § 455 provides that:

> "Any * * * judge of the United States shall disqualify himself in any case in which he * * * is or has been a material witness * * *."

Petitioners argue that, if a hearing were held as the result of this motion, the trial judge would be called as a witness by them. They contend, therefore, that the trial judge should disqualify himself from considering this application. We reject the argument and deny the motion. We reiterate what we said in *Mirra* v. *United States*, 255 F. Supp. 570, 582-83 (S. D. N. Y. 1966), *aff'd*, 379 F. 2d 782 (2d Cir.), *cert. denied*, 389 U. S. 1022 (1967):

> "An application for collateral relief under § 2255 must be filed in the sentencing court, rather than in the district court where the prisoner is confined,

as was the practice under habeas corpus, precisely because the sentencing judge does have intimate knowledge of the facts and circumstances of the case. This statutory requirement was designed to relieve other judges from the labor of learning the facts from a cold and often voluminous record and to correct the unseemly practice under habeas corpus of pitting the credibility of a United States district judge against that of a convicted criminal. Equally imperative was the congressional purpose of preventing a disruption of judicial business while the trial judge was absent from his own court testifying in another. This congressional design to supplant a cumbersome, expensive and highly unsatisfactory procedure with a sound, efficient and practical one, would be wholly frustrated if the trial and sentencing judge were disqualified as

APPENDIX C

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of June one thousand nine hundred and sixty-nine.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
Circuit Judges.

CARMINE PANICO and CARLIE DIPIETRO,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the

Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellants.

A. DANIEL FUSARO
Clerk

APPENDIX D

Exhibit D, Annexed to Affidavit of Jerome Lewis, Esq, in Support of Section 2255 Motion (Consists of New York State Prison-Medical Records Re: Salvatore Panico Consisting of "Dannemora State Hospital Clincal Summary" and "Proceedings for Commitment of Insane Prisoners to Dannemora State Hospital")

CONFIDENTIAL . . . PROFESSIONAL PURPOSES ONLY

DANNEMORA STATE HOSPITAL CLINICAL SUMMARY 9340

Name: Salvatore Panico

* * *

Hosp. No. 7171

Sex: Male Age on admission: 37

Birthplace: Manhattan, New York

Citizen

Separated

Date of admission: August 22, 1962

Date of summary: August 29, 1962

Name and address of nearest relative: Brother: Frank Panico, 251 Bay 41st St., Brooklyn, New York

---

DIAGNOSIS

Patient was admitted to the Dannemora State Hospital on August 22, 1962, by transfer from Sing Sing Prison, where he was serving a sentence of 2-6-0/5-0-0, for the crime of Burglary 3°. He was sentenced on April 5, 1962, by the Hon. Irwin D. Davidson, Judge of the

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Court of General Sessions of New York County. His full term of sentence expires on February 1, 1967; he is being held for the October 23, 1963 Parole Board.

FAMILY HISTORY

Negative for mental or nervous disorders. Patient's father was a laborer who died in an industrial plant fire in 1935.

PERSONAL HISTORY

The patient was born on April 25, 1925 in New York City. He reached the 6th term of High School at the age of 16. He was a satisfactory student in all areas until his final term when he became truant. He has worked as an auto (one word illegible), as a dock worker, insurance agent and in various businesses by himself or in partnership with one of his brothers. Before this present arrest he was unemployed for over one year. He is a Catholic but little interested in Church activities. He married in 1948 and has two children. In 1960 he separated from his wife. He served in the U. S. Navy from May 1942 to April 1945 and received an honorable discharge. He admits moderate use of tobacco, denies drugs.

CRIMINAL HISTORY

2- 8-56 Un. Poss. Dang. Weapon
Bklyn Spec. Sess.

Fined $200

9-14-56 Dis. Conduct

Bklyn Spec. Sess.
Discharged

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9-18-59 Entering w/o Breaking

Crim. Ct. of Records, Miami, Florida
State Prison

5-11-60 Conspiracy to Viol. Fed. Narcotics Law

U. S. District Crt., Eastern Dist., N. Y.
Trial pending

9-15-60 Vio. Sec. 722-11 PL (Consorting)

Bklyn Mag. Ct.
Dismissed

3- 1-62 Fugitive

Mag. Crt.
Dismissed

3-19-62 Conspiracy as Fel. & Viol. Sec. 1897 P.L.

Bronx County Crt.
For Trial

Present Offense: Burglary 3°. On September 22. 1960, being armed with pistol by means of Burglary tools, broke and entered the premises of the Nu Plan Management Corp.

PREVIOUS ADMISSION TO MENTAL HOSPITALS

There is no record of any previous admission to mental hospitals.

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First Admission—Dannemora State Hospital

Onset of Mental Illness

He has a history of recent suicidal attempts by hanging and by inflicting lacerations on himself. He is depressed, crying, despondent, over the fact that "the fellows at the trial are out to get me here too". He has not eaten because the food is poisoned "they" put needles and bamboo sticks in his food. On the wall he saw God's face.

Mental Examination

The patient was admitted to Ward 2 and placed in a restraint sheet because of his suicidal tendencies. During the interview, he cooperated poorly, was depressed, sitting with his head bowed down and only occasionally giving as "yes" or "no" answer. He admitted that he did refuse to eat because there was poison in his food and he was afraid because "fellows" were "after" him. Yesterday and today he only drank liquids but refused to eat food and gave no answer why he was not eating. He does not know if he did see God's face or not. He was described as of low average intelligence. He reached the 6th term of high school. Because of patient's uncooperativeness, the examination was discontinued and he was placed on Nardil 15 mgm. t.i.d.

Physical Examination

This is a 37 yr. old white male of asthenic body type, many teeth missing, slight impaired vision in the right eye, grossly impaired in the left eye, sluggish reflexes, history of tonsillectomy, history of appendectomy, his-

tory of gun shot wound, rt. shoulder. Otherwise no deviation from the normal.

W. Natkanski (signature)
Wincenty Natkanski, M.D.
Senior Psychiatrist

WN/ab

PROGRESS SINCE ADMISSION

Since admission, patient was placed on tranquilize medication til Jan. 12, 1963 and has shown progressive improvement. Since Jan. 22, 1963 he resides in Ward 15 where he is considered a quiet, cooperative, well behaved patient and good worker in the Bakery. Since his admission, he has not caused trouble in his management. He is very anxious to go back to the prison. His Parole Term expires on October 23, 1963.

LAST NOTE MARCH 25, 1963

This patient being without any medication since Jan. 12, 1963 has shown steady improvement working effectively in the Bakery being well behaved, cooperative, sociable, in fairly good contact and free of overt psychotic trends. He seems to have reached maximum benefit of hospitalization and is very anxious to go back to the prison. He is presented to the staff with recommendation.

(Illegible Signature)

George Vlavianos, M.D.—Supervising Psychiatrist

Appendix D

CONFIDENTIAL AND PRIVILEGED COMMUNICATION. FOR PROFESSIONAL PURPOSES ONLY. NOT TO BE USED AGAINST THE INTERESTS OF THE PATIENT.

DANNEMORA STATE HOSPITAL CLINICAL SUMMARY

Name: Salvatore Panico

* * *

Hos. No.: 7171

* * *

DIAGNOSIS

Subsequent Cause, September 13, 1963

Patient was scheduled to be presented to the Staff on 4/9/63, but his presentation had to be postponed until now because he became nervous, tense, and sleepless. He was informed at that time that his daughter had to have a major operation and he started worrying. He was placed at that time on Thorazine treatment until 7/5/63. He has not stopped his job in the Bakery and he continues to behave. On June 2, 1963, he was found already to have recovered completely from this episode. Since that time, he maintains his improvement being free of overt psychotic trends and he asks again to be presented to the Staff. His diagnosis is Schizophrenia, Paranoid Type.

LAST NOTE SEPTEMBER 13, 1963

Patient is getting no medication since 7/5/63. He is a good and steady worker in the Bakery and participates actively in group psycho-therapy. He is cooperative, well behaved, in good contact, relaxed, and free of overt psy-

chotic trends. He seems to haye reached maximum benefit of hospitalization and he is presented to the Staff with recommendation.

(illegible signature)
George J. Vlavianos, M. D.
Supervising Psychiatrist

GJV:vah

September 17, 1963: Salvatore Panico was *presented today by Dr. Vlavianos* to consider his return to Green Haven Prison. He was admitted on August 22, 1962 from Sing Sing Prison where he was serving a sentence of 2-6-0/5-0-0 for the crime of Burglary 3°. His admission to Dannemora was caused by development of depressive reaction with suicidal attempt. He has had paranoid ideas with undue suspiciousness. This patient has made a good adjustment from the beginning. He has never been any problem in management. He has been working effectively in the bakery. He was scheduled to be presented to the Staff on April this year, because of the fact that he has become depressed after learning the news about his daughters sickness and the need to have a major operation. He has responded to medication and this was discontinued on July 5, 1963. He is in good contact, he shows no evidence of any symptoms suggesting Schizophrenia which was the original impression. Today at Staff his ward physician as well as the Staff and psychologists, whom he had in group therapy and recently gave psychological test, which failed to reveal any evidence of Schizophrenia, expressed the idea that the patient has Psychopathic Personality and has not seen any evidence of Schizophrenia. Accordingly, the patient's di-

agnosis is changed from Schizophrenia, Paranoid, to Psychosis with Psychopathic Personality, Depressed Episode. The patient has recovered and is found suitable to return to prison.

DIAGNOSIS: PSYCHOSES WITH PSYCOPATHIC PERSONALITY, DEPRESSED EPISODE

CONDITION: RECOVERED FROM PSYCHOSIS

RECOMMENDATION: RETURN TO GREEN HAVEN PRISON

DATE: SEPTEMBER 26, 1963

Izaak Gorlicki, MD
Assistant Director

IG:dd

Appendix D

SUPREME COURT OF THE UNITED STATES

I, JOHN F. DAVIS, Clerk of the Supreme Court of the United States, do hereby certify that the foregoing typewritten pages, numbered from 1 to 4, inclusive, contain a true copy of the Dannemora State Hospital Clinical Summary in the case of

---

ANTHONY MIRRA,

Petitioner,

vs.

UNITED STATES

No. 705 Misc., October Term, 1963, as the same remains upon the files and records of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the City of Washington, this third day of January, A.D. 1964.

JOHN F. DAVIS
Clerk of the Supreme Court
of the United States.

Appendix D

STATE OF NEW YORK
DEPARTMENT OF CORRECTION

PROCEEDINGS FOR COMMITMENT OF INSANE PRISONERS TO DANNEMORA STATE HOSPITAL

Report of Physician

IN THE MATTER
of
THE COMMITMENT TO DANNEMORA STATE HOSPITAL
of
SALVATORE PANICO, No. 129-446
AN ALLEGED INSANE PRISONER

To Louis J. Kelley, Acting warden in charge of the * * * Sing Sing Prison.

The report of Norbert S. Bruckman, M.D. respectfully shows:

1. That he is the psychiatrist of the Sing Sing Prison.

2. That in his opinion Salvatore Panico, No. 129-446 a prisoner confined in the aforesaid institution, is insane.

3. That the facts upon which this report is based are as follows:

(The physician should state any facts observed by or any information known to him which would tend to show

the existence of insanity, such as excitement, violence, despondency, irrational acts, declarations, attempts at suicide, and attempts or threats to injure others, etc.)

The inmate has a history of recent suicidal attempts by hanging and inflicting lacerations on himself (multiple scars on both forearms). He is depressed, crying, despondent over the fact that "the fellows at the trial are out to get me here, too". He has not eaten because the food is poisoned, "they" put needles and bamboo sticks in his food. He is suspicious of everybody here, always in fear that "they" would harm him. While in the hospital at the Federal Detention House he saw a mark on the ceiling, he climbed up the wall to observe it closer and saw God's face. He, therefore, felt protested. The fellows came twice to get him but he defended himself by throwing chairs at them. He is likely to injure himself if precautionary measures are not taken.

4. That he verily believes it to be for the best interests of the said alleged insane prisoner that he be committed to Dannemora State Hospital.

Tentative Diagnosis: Schizophrenia, paranoid type.

Dated July 12, 1962

/s/ NORBERT S. BRUCKMAN, M.D.

Appendix D

APPLICATION FOR ORDER TO EXAMINE

IN THE MATTER

of

SALVATORE PANICO, SSP No. 129-446
AN ALLEGED INSANE PRISONER

To the Hon. John H. Galloway, Jr., Judge of Westchester Court; County of Westchester:

Upon the foregoing report of Norbert S. Bruckman, Jr. physician to the Sing Sing Prison, I hereby apply for the appointement of two examining physicians to examine into the mental condition of the said Salvatore Panico, SSP No. 129-446.

/s/ L. J. KELLEY
Acting Warden

Dated July 12, 1962

Appendix D

ORDER TO EXAMINE

IN THE MATTER

of

AN ORDER TO EXAMINE

SALVATORE PANICO, SSP No. 129-446
AN ALLEGED INSANE PRISONER

Upon the foregoing report of Norbert S. Bruckman, M.D., physician to the Sing Sing Prison, and the foregoing application of Louis J. Kelley, Acting warden or other officer in charge of Sing Sing Prison, I hereby order that Anthony Panago, M.D., and Maurice J. O'Connor, M.D., two examining physicians, be, and they hereby are, appointed to examine Salvatore Panico SSP No. 129-446 to his mental condition and report thereon pursuant to the statute.

(Illegible signature)
Justice or Judge of County
Court of Westchester

Dated July 24, 1962

The following should be filled out by two examining physicians as provided by section 383.

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Certificate of Examining Physicians

This certificate is composed of two parts: (a) history obtained by physicians; (b) examinations of physicians.

(a) History Obtained by Physicians

1. Patient is at Sing Sing Prison, county of Westchester, age 36 years, nativity, state or county Manhattan, N. Y. C.; is he a citizen of the U. S.? Yes. If foreign, date of arrival in U. S.? . . . ; port of entry . . . steamship or line . . . . Is he a legal resident of New York State? . . . ; if so what county, city or town? . . . How long has he resided in New York State? . . . . If not a resident of New York State where is his legal residence? . . . Sex Male; color White; occupation Salesman; Separated.

2. Birthplace of father . . . ; of mother . . . Legal residence of father, if living . . . Legal residence of mother, if living 1474 86th St., Brooklyn, N. Y. Has the patient had any mentally ill relatives? . . . If so, state relationship and whether paternal or maternal . . . Have any of the relatives been in institutions for the mentally ill? . . . If so, state relationship and give name and location of institution with length of residence therein . . . How discharged? . . . Has patient been considered as of normal mental standard? . . . Number of previous attacks of insanity . . . Institution or institutions where cared for in previous attacks . . . Has the patient had treatment of syphilis? . . . To what extent does he use liquor, tobacco, drugs? . . . When did present attack begin? Awaiting trial in federal jail, approximately April '62 Was it characterized by depression, excitement, untidiness, destructiveness, suicide or homicidal tendencies,

delusions, hallucinations, etc.? Apparently developed delusional ideas about April 1962 and during trial his behavior was very disturbed. Since then insists "they" (other defendants on trial) are trying to kill him accusing him of being a stool pidgeon and a rat and also "they" are scheming with the guards and paying the guards to poison him. What was first noticed? April 1962.

(b) Examination by Physicians

Physical Condition:

States he has not being eating as he is afraid to eat and has lost considerable weight, has constant headaches. Sinus (one word illegible).

Mental Condition:

Appears depressed, cries; worn and haggard. Suspicious, fearful. Answers questions readily but at times is evasive and at times irrelevant in his replies. States he is persecuted by other defendants ("they") who call him a stool pidgeon and a rat and have been trying to kill him by poisoning and assault. Is reluctant to admit self-destructive acts. Denies he is mentally disturbed. Considers his situation is sufficient to account for his disturbance. Is comfortable when locked in his cell; fearful and apprehensive when out of cell. Protests that it is only reasonable to be fearful out of his cell.

In your opinion is patient liable to injure himself? Yes or to injure others? Yes.

We, Maurice J. O'Connor, a legal resident of Ossining, county of Westchester, State of New York, and Anthony

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M. Pagano, a legal resident of Ossining, county of Westchester and State aforesaid, do severally certify and each for himself certifies, with the exceptions which are hereinafter noted, as follows:

1. I am a reputable physician, duly licensed to practice medicine in New York State, and have been in the actual practice of my profession for at least three years.

2. I have with care and diligence personally observed and examined on the date of the certificate, namely, on the 25 day of July, 1962, Salvatore Panico, now residing or being at Sing Sing Prison in the county of Westchester and as a result of such examination, find and hereby certify that he is insane and a proper subject for custody and treatment in the Dannemora State Hospital, as an insane person under the provisions of the statute.

3. I have formed this opinion from the history of the case and my examination of the patient as given above.

4. I hereby certify that the facts stated and information contained in this certificate are true to the best of my knowledge and belief.

/s/ MAURICE J. O'CONNOR, M.D.
/s/ ANTHONY M. PAGANO, M.D.

Appendix D

(Use Form (illegible) D.M.H. For Service on the Alleged Insane Prisoner and/or Others)

Service of Notice Upon the Alleged Mentally Ill Person and/or Others

State of New York
County Court, County of Westchester

In the Matter

of

An Application for the Commitment of

Salvatore Panico No. 129-446

Take Notice that on the annexed petition of Louis J. Kelley and the cert. of Doctors Anthony M. Pagano and Maurice J. O'Connor an application will be made before the Honorable Hon. John H. Galloway, Jr., Judge of Westchester County Court at the Courthouse at 10 A.M., on the 17th day of August, 1962 for an order committing you to Dannemora State Hospital, Dannemora, New York.

/s/ Louis J. Kelley
Louis J. Kelley Petitioner
Acting Warden

Appendix D

PETITION

IN THE MATTER

of

AN APPLICATION FOR THE COMMITMENT

of

SALVATORE PANICO No. 129-446
AN ALLEGED INSANE PRISONER

To the Hon. , Judge of County Court; County of Westchester:

Upon the foregoing certificate of examining physician dated July 25th, 1962, I hereby apply for an order committing said Salvatore Panico-SSP No. 129-446 to the Dannemora State Hospital. Service upon a realtive Brother—Frank Panico, 251 Bay 14th Street, Brooklyn, N. Y., has been made.

Dated August 13th, 1962.

(Signature) LOUIS J. KELLEY
Louis J. Kelley
Acting Warden

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AFFIDIVIT OF SERVICE

COUNTY OF WESTCHESTER, SS:

LOUIS J. KELLEY, being duly sworn, says that he is over 21 years of age, and that on the 13th day of August, 1962, at Sing Sing Prison he served a notice of application for an order adjudging such person to be insane upon Salvatore Panico No. 129-446 and upon Frank Panico the Brother of Salvatore Panico No. 129-446, an alleged insane prisoner, by delivering a true copy of said notice and petition personally to the patient and serving the same by registered mail upon Frank Panico. He further says that he knew the persons served, as aforesaid, to be Salvatore Panico No. 129-446, the alleged insane prisoner and Frank Panico the Brother of the person named and described in the said application.

Sworn to before me this
13th day of August, 1962

(illegible signature)

(illegible signature)
(Signature of server of notice)

Appendix D

CERTIFICATE OF JUSTICE OF JUDGE RELATING TO PERSONAL SERVICE

STATE OF NEW YORK
COUNTY COURT, COUNTY OF WESTCHESTER

Before the Hon. John H. Galloway, Jr., Justice or Judge of County Court; County, City or Town of Westchester on the 21 day of August, 1962.

IN THE MATTER
of
AN APPLICATION FOR THE COMMITMENT
of
SALVATORE PANICO
AN ALLEGED INSANE PRISONER

---

(1) I do hereby certify, as appears (one word illegible) the affidavit of service submitted to me, that satisfactory proof of personal service has been made upon the person above named on August 13, 1962, and service by registered mail upon Brother-Frank Panico, who is brother of the person, by Louis J. Kelley, who is the Acting Warden Sing Sing of the city, town or village of Ossining in the county of Westchester.

Or (2) I do hereby certify, as appears by the affidavit of service submitted to me, that satisfactory proof of personal service has been made upon the person above-named on August 13, 1962.

/s/ JOHN H. GALLOWAY
Judge of the County Court
of Westchester

Appendix D

ORDER OF COMMITMENT
STATE OF NEW YORK
COUNTY COURT, COUNTY OF WESTCHESTER

Before the Hon. John H. Galloway, Jr., Judge of Court, County, City or Town of Westchester on the 21 day of August, 1962.

IN THE MATTER
of
AN APPLICATION FOR THE COMMITMENT
of
SALVATORE PINICO
AN ALLEGED INSANE PRISONER

Upon the petition of Louis J. Kelley, dated August 13, 1962, and a certificate made by two examining physicians, which certificate is dated on the 25 day of July, 1962, and which is annexed hereto, and upon such other facts and information as were produced before me (or a referee appointed by me) at a hearing duly had, and being satisfied that the above alleged insane person is insane and a proper subject for custody and treatment in an institution for the insane, within the meaning of the statute, and service of notice of application for this order of . . . commitment upon a relative or friend having been dispensed with inasmuch as there is no such known relative or friend in the state,

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ORDERED, That the said Salvatore Panico be and hereby is adjudged insane and that he be committed to the Dannemora State Hospital, an institution for the treatment of mental diseases.

ORDERED, That the superintendent of Dannemora State Hospital forthwith at the time of the commitment of Salvatore Panico to said Hospital, forward a verbatim copy of the entire proceeding herein to the office of the Clerk of Westchester County.

ORDERED, That the said papers so sent shall be sealed in the office of the County Clerk of Westchester County, and be exhibited only to the parties to the proceedings, or someone properly interested, upon the order of the Court.

Dated August 21, 1962

/s/ JOHN H. GALLOWAY
Judge of the County Court
of Westchester

I, JOHN F. DAVIS, Clerk of the Supreme Court of the United States, do hereby certify that the foregoing typewritten pages, numbered 3 to 9, inclusive, contain a true copy of the Proceedings for Commitment of Insane Prisoners to Dannemora State Hospital in the case of

ANTHONY MIRRA,

Petitioner,

vs.

UNITED STATES.

Appendix D

No. 705 Misc., October Term, 1963, as the same remains upon the files and records of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the City of Washington, this third day of January, A.D. 1964.

JOHN F. DAVIS
Clerk of the Supreme Court
of the United States.

APPENDIX E

Exhibit E, Annexed to Affidavit of Jerome Lewis, Esq. in Support of Section 2255 Motion (Consists of Correspondence of Messrs. Steinberg, Cox and Glasser, May-June 1965)

HARRIS B. STEINBERG
COUNSELOR AT LAW

25 BROAD STREET
NEW YORK 4, N. Y.
WHITEHALL 4-8900

May 5, 1965

Hon. Archibald Cox
Solicitor General
Department of Justice
Washington, D. C. 20530

Re: *United States* v. *Bentvena, et al.*
October Term 1963, Nos. 344, 346
356, 359, 468, 441 Misc., 492 Misc.

Dear Archie:

I appeared for Carlie DiPietro (No. 346) in the above case both in the United States Court of Appeals for the Second Circuit and in the petition for *certiorari* to the United States Supreme Court. The Court denied *certiorari.*

Recently Abraham Glasser, Esq., who was on the brief for some of the other defendants both in the United States Court of Appeals and in the petition for *certiorari,* brought to my attention and to the attention of other lawyers who had been in the case, certain information which indicates the possibility that the Supreme Court

may have been misled in its appraisal of the sanity of Panico, because of certain statements made in the Government's brief and because of the illegibility of certain photocopies.

To put it most concretely, I am quoting a portion of a letter received from Mr. Glasser which sets forth the basis of the foregoing possibility:

> "The new information to which I am referring was, in brief, that the Solicitor General's office had given the Supreme Court of the United States a seemingly inaccurate presentation concerning the final psychiatric diagnosis of the defendant Salvatore Panico. The actual final diagnosis by prison psychiatrists at Dannemora, dated September 26, 1963, was that '* * * the patient's diagnosis is changed from Schizophrenia, Paranoid to Psychosis with Psychopathic Personality, Depressed Episode. The patient has recovered and is found suitable to return to prison.' To this the Solicitor General appended a footnote saying that 'We are lodging with the Court' two certain described documents relating to Salvatore Panico's prison-psychiatric history; one of the above quoted final diagnosis of 'psychosis with psychopathic personality, depressed episode.'
>
> In a telephone conversation with Mr. Davis, the Clerk of the United States Supreme Court, I learned that the above mentioned documents lodged with the Court by the Solicitor General were illegible or very poorly legible photocopies. Later I obtained from Mr. Davis typewritten transcripts of those photocopies, which had either proved to be

more decipherable or which perhaps had been replaced with more legible copies. It was upon receiving these typewritten copies from Mr. Davis that I discerned the full apparent import of the situation, and it was then that I communicated with Jerome Lewis as above mentioned.

I have been advised by an official at Bellevue Hospital that a person with the diagnosis 'psychosis with psychopathic personality, depressed episode' would absolutely be incompetent to stand trial upon a charge of crime, and that this would indubitably be the view of any qualified psychiatrist.

My own evaluation of the foregoing (which you will please bear in mind is only a summary) is that there are strong indications that the Supreme Court of the United States was erroneously led to believe that Salvatore Panico never suffered from any trial-disqualifying psychotic condition at all; and that a full exploration, as through a '2255' proceeding on behalf of a defendant such as Carmine Panico, would have a realistic prospect of establishing that Salvatore Panico was mentally unfit to stand trial."

I know that the high standards to which you hold your staff and your self, as well as your respect for the Supreme Court will move you to look carefully into the foregoing information and that if you come to the conclusion that there was indeed a possibility that the Court was misled, you will join with counsel for the defendants in doing whatever is necessary to see that justice is done.

Appendix E

As you know, the sentences in this case were extremely severe—the client I represented, Carlie DiPietro, was sentenced to fifteen years—and it is of the utmost importance that any misunderstanding, if it was operative should be corrected.

I shall await your reply when you have had an opportunity to look into this matter.

With very best personal regards,

Sincerely,

HBS:MD

bcs: Messrs. DiPietro
and Glasser

Abraham Glasser
52 Eighth Avenue
New York 14, New York
May 11, 1965

Hon. Archibald Cox
Solicitor General
Department of Justice
Washington, D. C. 20530

Re: *United States v. Bentvena, et al.*
October Term 1963, Nos. 344, 346, 356, 359, 468, 441 Misc., 492 Misc.

My dear Mr. Solicitor General:

Harris Steinberg has sent me a copy of his letter to you dated May 5, 1965 concerning the above case, in

which he quotes a portion of a letter by me where I described a possibility of the Supreme Court's having been misled in its appraisal of the sanity of defendant Salvatore Panico.

I have been engaged to assist Jerome Lewis, attorney for defendant Carmine Panico (brother of Salvatore), in connection with proceedings that may have to be brought on the basis of the information quoted in Mr. Steinberg's letter.

As the person who "dug up" this information, I am writing to offer you my cooperation, consonant with the proper interests of Mr. Lewis' client.

Mr. Lewis and the Panico family have requested me to mention in this letter that they do not regard the letter of Mr. Steinberg (as attorney for defendant DiPietro) as excluding any other steps on behalf of Carmine Panico, e.g., by way of a '2255' proceeding or an application to the Supreme Court. But it is my advice to Mr. Lewis and the Panico family that they wait a reasonable period for you to decide your own course in the Supreme Court in the light of Mr. Steinberg's letter.

Respectfully,

ABRAHAM GLASSER

AG:srs

cc: Harris B. Steinberg, Esq.
Jerome Lewis, Esq.

Appendix E

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D. C. 20530

June 1, 1965

ABRAHAM GLASSER, Esq.
52 Eighth Avenue
New York 14, New York

Re: *United States* v. *Bentvena, et al.*, October Term, 1963 (Nos. 344, 346, 356, 359, 468, 441 Misc., 492 Misc.)

Dear Mr. Glasser:

In response to your letter concerning the above-captioned cases, I am enclosing a copy of a letter which I am addressing today to Harris B. Steinberg, Esq., counsel for the petitioner in No. 346. It is, I believe, self-explanatory.

Sincerely,

ARCHIBALD COX
Archibald Cox
Solicitor General

Encl.

RSS:mch

Appendix E

May 28, 1965

HARRIS B. STEINBERG, Esq.
25 Broad Street
New York 4, New York

Re: *United States* v. *Bentvena, et al.*, October Term, 1963 (Nos. 344, 346, 356, 359, 468, 441 Misc., 492 Misc.)

Dear Mr. Steinberg:

I appreciate your calling to my attention your misgivings concerning the course of the Supreme Court proceedings in the above cases. I have reviewed the papers very carefully and am satisfied that no injustice occurred and the Court was in nowise misled.

The following facts seem decisive.

1. The question of Panico's mental condition while confined at Dannemora, if relevant at all, is at best peripheral to the above cases. That was the main thrust of the relevant paragraph in our memorandum in No. 705 Misc., in which we stated, "This is not the place to resolve the question of Panico's sanity."

2. The government's summary of the action of the New York prison authorities seems to me not only to have been literally accurate but correct in its substantive implication. The New York authorities did conclude that schizophrenia was not a correct diagnosis. Panico was found suitable for return to prison. The net effect of our comment, although one might wish in retrospect that it had included a statement describing the second diagnosis, was

to argue that the Dannemora authorities did not find Panico to be in such a disturbed condition as would lay a foundation for the inference that he was deranged or incompetent at the time of the trial. I do not believe that this was inaccurate, although I recognize that such reports may be subject to varying interpretations.

3. In all events, the footnote to this part of our brief made it plain that the exact text of the full clinical summary was available to the Court in the event that any Justice considered that anything turned upon the exact findings of the Dannemora State Hospital authorities.

4. The copy of the Dannemora State Hospital clinical summary lodged with the Clerk was, and is, readily legible. I enclose a Xerox copy of the document itself for your examination.

5. The Court would undoubtedly have read the clinical summary if it felt that the cases turned in any way upon the exact nature of the findings. Furthermore, the course of proceedings in the Supreme Court makes it evident that all of the issues were examined very carefully. Of course the competence of Panico to stand trial was thoroughly probed both at the trial and on review.

In view of the foregoing facts, I cannot believe that the Court was in any way misled or failed to understand the issues before it.

Sincerely,

ARCHIBALD COX
Solicitor General

Encl.

APPENDIX F

Affidavit of Psychiatric Consultant, Jay Katz, in Support of Section 2255 Motion

STATE OF CONNECTICUT }
COUNTY OF NEW HAVEN } ss.:

JAY KATZ, being duly sworn, deposes and says:

I have been engaged by authority of Jerome Lewis, Esq., the attorney for the above named movants, as a psychiatric consultant to advise counsel, to make needed and appropriate affidavits, and, if called upon, to testify concerning certain aspects of the mental condition or mental competence of one Salvatore Panico during times in the years 1962-1967 stated to me by counsel as being relevant. My engagement for these purposes by authority of Mr. Lewis, and my consultations with counsel concerning this matter, have been carried out through Abraham Glasser, Esq., as Mr. Lewis' associate in this matter. I make this affidavit at the request of counsel for the above named movants.

Counsel has requested me to include in this affidavit a summary of my professional qualifications:—

1940-1944—University of Vermont—B.A.

1945-1949—Harvard Medical School—M.D.

1951-1953—1st Lieutenant and Captain, USAF Hospital, Maxwell Air Force Base, Alabama (1951-1952 Staff Psychiatrist, 1952-1953, Chief of Psychiatry).

1956- —Diplomate, American Board of Psychiatry Neurology.

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1957-1958—Assistant Professor of Psychiatry, Yale University School of Medicine.

1958-1960—Assistant Professor of Psychiatry and Law, Yale University.

1960-1967—Associate Professor of Law, Yale University.

1960-1967—Associate Clinical Professor of Psychiatry, Yale University.

1961 —Graduate, Western New England Institute for Psychoanalysis.

1967 —Professor (Adjunct) Law and Psychiatry, Yale University.

Fellow, American Psyichatric Association and American Orthopsychiatric Association.

Member, Group for the Advancement of Psychiatry,

American Psychoanalytic Association.

Advisory Board, The Journal of Nervous and Mental Disease.

Consulting Supervisor, Yale Psychiatric Institute.

Committee on Law and Mental Health, American Ortho-psychiatric Association, Chairman (1963-1966), Member (1967-).

Co-author—The Family And The Law (1964)—Psychoanalysis, Psychiatry and Law (1967).

I am advised that counsel's purpose in requesting an affidavit by me at this juncture is that such affidavit may be included in papers to be filed on behalf of the above named movants in this Court and in the Supreme Court

of the United States—and perhaps also in the United States Court of Appeals for the Second Circuit. I am informed by counsel that in this Court the papers to be filed are for the purpose of collateral review of certain 1962 narcotics convictions in this Court, such review to be sought under the provisions of 28 U.S.C. §2255. I am informed by counsel that in the Supreme Court the papers to be filed are for the purpose of either a petition for re-hearing of denial of certiorari in connection with the aforesaid 1962 convictions, or to keep the Supreme Court currently informed of the instant §2255 proceedings pending other application to the Supreme Court, or for both of these purposes. I am informed by counsel that if the papers are also to be filed in the Court of Appeals the purpose would be either to invoke the re-hearing powers of that Court for further review of the aforesaid 1962 convictions, or to keep that Court currently informed of the instant §2255 procedings pending other appropriate application to that Court or to the Supreme Court, or for both of these purposes.

In preparation for the making of this affidavit I have studied certain of the prior legal papers in this case (details *infra*), I have personally interviewed and examined Mr. Salvatore Panico in conjunction with my colleague Dr. Ernst Prelinger (details *infra*), and I have conferred with counsel (Mr. Glasser).

The prior legal papers in the case which I have read are:— pages 5638-5662 of the stenographic minutes of the 1962 trial in this Court in which the aforementioned narcotics convictions occurred, these pages being the portion of the trial minutes where an especially severe outburst by Salvatore Panico took place; pages 9133-9155 of the same trial minutes, consisting of the contempt proceeding

against Salvatore Panico by this Court in which His Honour Judge McMahon cited and quoted various incidents of misbehaviour by Salvatore Panico during the 1962 trial; and other portions of those same trial minutes which are embodied or cited in various printed papers now to be mentioned which relate to Salvatore Panico's psychiatrically pertinent conduct at the 1962 trial.

The printed papers just mentioned which I have read are:— the "Appendix (Supplemental) On Behalf Of Appellants Carmine Panico and Salvatore Panico", filed in the United States Court of Appeals under docket no. 27733, being bound in a blue cover, consisting of 146 pages and comprising (I am advised by counsel) the substantial entirety of the 1962 trial record materials relating to the mental competency of Salvatore Panico during said trial and the medical proceedings before this Court on that subject during said trial; the printed briefs on appeal for appellants Carmine Panico and Salvatore Panico, for appellant Carlie DiPietro, and for appellant Angelo Loicano, in the United States Court of Appeals for the Second Circuit, docket no. 27733, including reply briefs; the printed brief for the Government in the latter appeal; the opinion of the Court of Appeals in the latter appeal (319 F. 2d 916); all of the certiorari papers for the petitioners and for the Government as to Carmine Panico, DiPietro and Loicano in connectoin with the 1962 narcotic convictions; all of the papers in the Supreme Court of the United States in the certiorari proceeding for review of the contempt conviction of Salvatore Panico in this Court (U.S.S. Ct., Oct. Term 1962, no. 633, reversed, 375 U. S. 29, October 21, 1963, renumbered Oct. Term 1963, no. 45); also the papers in the aforesaid contempt proceeding on appeal in the United States Court of Appeals for the Second Circuit (308 F. 2d 125).

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In addition I have read the following:— a photocopy of a typewritten form item entitled "State of New York —Department of Correction, Proceedings For Commitment Of Insane Prisoners To Dannemora State Hospital", etc., relating to Salvatore Panico, a copy of which I am informed is annexed to the within accompanying affidavit of Mr. Lewis; a photocopy of a typewritten form document entitled "Dannemora State Hospital Clinical Summary", etc., a copy of which I am informed is annexed as an exhibit to Mr. Lewis' affidavit herein; and copies of a letter dated May 5, 1965 from Harris B. Steinberg (trial counsel for DiPietro) to then Solicitor General Archibald Cox, a letter dated May 11, 1965 from Mr. Glasser to then Solicitor General Cox, and a letter dated May 28, 1965 from Mr. Cox to Mr. Steinberg—copies of these letters, I am informed, being annexed to the affidavit of Mr. Lewis herein.

I have also held several conferences with Mr. Glasser, and I have read other correspondence written by him in which the facts and the issues as to Salvatore Panico's mental condition are discussed from the standpoint of attorney and client.

As above mentioned, my colleague Dr. Prelinger and I have conducted interviews, psychological examinations and psychological tests in personal meetings with Salvatore Panico. Dr. Prelinger, who is Associate Professor of Psychiatry (Psychology) at Yale University, and who is a qualified psychological tester whom I regularly engage to assist and advise me in cases in which I am retained as a psychiatric consultant, saw and psychologically tested Salvatore Panico on December 20 and 29, 1966, for a total of twelve hours. Dr. Prelinger's reports and work notes were submitted by him to me, and he and I thor-

oughly discussed his procedures, results and findings. Dr. Prelinger put Salvatore Panico through the following tests and other procedures:— Rohrschach Test; WAIS Test (Intelligence); Thematic Apperception Test; Bender Gestalt Test.

I held psychitric interviews with Salvatore Panico on December 20, 1966, 1½ hours, and January 4, 1967, 2 hours.

From all of the foregoing I aver as follows: I do not believe that Salvatore Panico was a malingerer or in any medical sense a "faker" during any of his acts of misbehaviour during the 1962 trial which commenced on May 23, 1962 his court outburst of May 23, 1962, being the violent incident when he shouted obscenities, charged into the jury box, etc. In the series of outbursts in the court room commencing May 23, 1962 Salvatore Panico was acting under emotional or psychological influences which he could not control. He may even have had what might be termed "insight" or conscious realization that his conduct was improper, but he was helpless to control that conduct by reason of largely unconscious psychological forces which dominated his mind at those times.

I further aver that, subject to my obtaining access to the additional medical records which I am informed by counsel cannot be made available until these §2255 papers are filed in Court, diagnostically speaking Salvatore Panico's behaviour was at least akin to that of psychotic persons with paranoid tendencies and with marked potential towards aggressive action engendered by convictions and fright of unjust persecution so profound and overmastering as to throw him helplessly into episodes of senseless and violent behaviour beyond his control; he was victim-

ized by suspicions which became elaborated into convictions of almost delusional certainty.

My averments in the preceding two paragraphs are stated in conclusional language. To elaborate:— Along with my study of the above enumerated papers and along with my consideration of Dr. Prelinger's data, in my own examination of Salvatore Panico I attempted to obtain both a complete history of his life and a detailed account of his state of mind during the trial of 1962. Mr. Panico is neither aparticularly introspective nor verbal person and this limited what I could learn about his life. At the same time Dr. Prelinger and I felt that Mr. Panico was honest in what he revealed to us and I found no evidence that he was consciously falsifying anything he told us.

The trial was an extremely stressful situation for Mr. Panico. He felt that he was falsely accused of a narcotics conspiracy and as the trial progressed he became convinced that he was framed not only by the witnesses who testified against him but also by the Government and Judge. This made him feel hopeless and helpless and gradually he began to lose control over his behaviour. At first he rationalized his various outbursts—suicidal attempts, his emotional reactions in court, etc.—as attempts to draw public attention to his plight but he soon realized that he could not control himself even if he had so desired. His codefendants pleaded with him to behave but he was unable to listen to them. There is an underlying paranoid trend to Mr. Panico and this created a state of mind which allowed him to involve everybody in a "frame" and, in turn, to let his suspicions become elaborated into convictions of almost delusional certainty as I phrased it above. Once in the Navy and on another

occasion when he was interrogated by a detective, he felt similarly convinced that everybody was against him and he lost control over his behavior. A significant contribution to Mr. Panico's inherent instability was made by the events surrounding his father's death. He was ten years old at the time. His father unbeknown to him, operated a still during the Prohibition. One day the still exploded and his father was severely burnt. He was able to make his way home and his son was confronted by a father with a horribly burnt face, looking more like a monster than a father. The boy was scared out of his wits. The next day his father died. Mr. Panico has never recovered from this event and at times still sees the face of his disfigured father with hallucinatory vividness on walls. There was another consequence to this event. Until then he had known his father as a strict law-abiding person who would not tolerate any immoral behaviour from his children. Now he learned that his father had engaged in illegal work; this, much more than he even realizes, undermined his faith in people of authority and contributed to his lack of faith in authority figures. He tries to compensate for this by a concomitant faith in "the government of the United States" and indeed he is quite a patriot but, on the other hand, whenever he feels "betrayed" these convictions are readily undermined and he sees everybody connected with the government as his unremitting enemy.

It is my impression that at the trial Mr. Panico felt so "tied-down" and frightened that he suffered from episodes of senseless and violent behaviour beyond his control. While neither Dr. Prelinger nor I found any current evidence of a schizophrenic disorder and instead would describe him as a severe character disorder with

marked potential toward aggressive acting-out—and paranoid tendencies—I would liken some of his behaviour in the court room as similar to behaviour manifested by psychotic persons. Since the physicians at Dannemora State Hospital made a diagnosis of "psychosis with psychopathic personality, depressed episode," I would like to review the clinical records of the hospital in order to determine whether at that time he might have been so regressed as to actually have been in a psychotic state. If I should be able to ascertain that, it will only further substantiate the frightening impact of the court proceedings on Mr. Panico. In this connection Dr. Weiss's testimony at the trial is also of relevance since he found that Mr. Panico was suffering from "psychosis of a paranoid condition." I agree with Dr. Weiss that Mr. Panico was not a malingerer.

Mr. Panico suffers now, and suffered at the operative times in 1962, from a very severe character disorder with very poor self-control especially when he is under stressful circumstances. Under the latter conditions uncontrolled aggression and paranoid thinking will be the most likely manifestation of the disordered behaviour. In light of even the incomplete hospital record which I have seen I find it could be possible that Mr. Panico was even more disturbed at the operative times in 1962 than I have thus far concluded and that he could be classified as having been at those times in an out-and-out psychotic condition. In my opinion the final Dannemora hospital diagnosis above mentioned, of "psychosis with psychopathic personality, depressed episode", could be correct. Again, then, I would wish to see the complete hospital record in order to form a final opinion as to whether a diagnosis of actual psychotic condition would be endorsed by me.

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In view of the sequence of Mr. Panico's outbursts at the 1962 trial and his psychiatric condition at those times, as revealed to me through my examination of the trial transcript materials and my examination of Mr. Panico, and from the thus far incomplete hospital record which I have seen, it was to be expected that he would continue to have outbursts and that these would be outbursts not faked by him. This expectation was the more to be taken into account by reason of the circumstance of Mr. Panico's having been restrained by a gag and shackles in the court room. In fact, the Trial Judge's conduct and attitude in relation to Mr. Panico would in all likelihood aggravate Mr. Panico's psychiatric condition and make him more vulnerable to these outbursts. When Mr. Panico thinks himself badly treated by superior authority he would lose his head. In the previously mentioned Navy incident he reacted in a paranoid manner to what he considered an unreasonable demand by an officer. My impression from reading the trial record materials is that the Trial Judge's interaction with Mr. Panico during the trial made Mr. Panico see the trial Judge as a real enemy, and that this further contributed to the paranoid outbursts of Mr. Panico in the court room. The Court was so convinced that Mr. Panico was a malingerer—when in my opinion he was not malingering—that Mr. Panico saw this attitude of the Court as further evidence that the Court was "against him" and trying to "defeat his just rights", and indeed he believed that the Court was trying to "destroy" him.

In light of the trial record materials and all the other facts which I have considered, my opinion is that there is a serious question of Mr. Panico's own competence to stand trial at the operative times in 1962, particularly in view of his paranoid inability (or paranoid unwillingness) to cooperate with his own trial counsel.

/s/ JAY KATZ, M.D.

(Sworn to March 4, 1968.)

APPENDIX G

Statutes Involved

28 U.S.C. §2255

§ 2255. Federal Custody; Remedies on Motion Attacking Sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, § 114, 63 Stat. 105.

21 U.S.C. § 174

§174. Same; penalty; evidence

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less

than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. Feb. 9, 1909, c. 100, § 2(c), (f), 35 Stat. 614; Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202, § 1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657; Nov. 2, 1951, c. 666, §§ 1, 5(1), 65 Stat. 767; July 18, 1956, c. 629, Title I, § 105, 70 Stat. 570.

28 U.S.C. § 455

"Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein. June 25, 1948, c. 646, 62 Stat. 908'."

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No. 69

In the Supreme Court of the United States

OCTOBER TERM, 1969

CARMINE PANICO and CARLIE DI PIETRO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

WILL WILSON,
Assistant Attorney General,

BEATRICE ROSENBERG,
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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 694

CARMINE PANICO and CARLIE DI PIETRO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 412 F. 2d 1151. The opinion of the district court is reported at 291 F. Supp. 728.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1969. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to October 3, 1969, and the petition was filed on that

day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's motion to vacate sentence was properly denied without a hearing.
2. Whether the trial judge should have disqualified himself from making such ruling.
3. Whether the conviction of petitioners should be vacated on the ground that the presumption provided by 21 U.S.C. 174 is unconstitutional.

STATEMENT

On July 10, 1962, after a trial by jury in the United States District Court for the Southern District of New York, petitioners and eleven co-defendants were convicted of narcotics offenses under 21 U.S. 173, 174. Carmine Panico was sentenced to imprisonment for twelve years and DiPietro to imprisonment for twenty years. The court of appeals affirmed, *United States* v. *Bentvena*, 319 F. 2d 916 (C.A. 2), certiorari denied *sub nom. Ormento* v. *United States*, 375 U.S. 940. As appears from the opinion on direct review and the opinion of the district court in the present proceeding (Pet. App. 16-36),[1] during the trial there were numerous verbal outbursts and acts of violence by various defendants,

[1] Petitioners have filed several appendices to which we refer as follows: "Pet. App." designates the appendix to the petition for certiorari. "App. 1 to 86" consists of the motion to vacate sentence. "App. 1a to 283a" is the separately paginated addendum thereto, which is bound in the same volume.

including these petitioners [2] and Salvatore Panico, the brother of petitioner Carmine Panico. A major issue on appeal from the conviction (and on petition for a writ of certiorari) was whether the trial court acted properly in dealing with this misconduct and whether the disorder created by the various defendants, including Salvatore Panico, required a severance at least as to him.

On April 30, 1968, petitioners moved under 28 U.S.C. 2255 to vacate their sentences and asked that the trial judge disqualify himself on the ground that he was of necessity a material witness within the meaning of 28 U.S.C. 455 (App. 1-86). In their motion to vacate, petitioners alleged that they had been denied a fair trial by co-defendant Salvatore Panico's conduct and the trial court's rulings with respect to it. They asserted that new medical evidence showed that Salvatore's conduct was caused by uncontrollable psychological or emotional factors; that the direct review proceedings were decided upon an unconstitutionally inadequate record; and that the government had not correctly represented the facts to this Court (App. 2-6). The alleged "new" facts relate to (1) hospital records of Salvatore Panico and the handling of these facts by the government upon direct review, and (2) proffered testimony of

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[2] On one occasion, after the court had ordered the removal of Salvatore Panico from the courtroom, Carmine Panico called the judge a "lousy bum" and the judge and the prosecutor "dirty bastards" (App. 152a-154a). On another occasion, DiPietro persisted in threats to strangle Salvatore Panico and to "get him" outside the courtroom, despite the orders of the court that he be quiet (App. 179a, 182a).

Dr. Jay Katz, a psychiatrist, concerning the sanity of Salvatore Panico at the time of trial.

(1) With regard to the hospital records of Salvatore Panico, the files and records of the case show that following his conviction on July 10, 1962, he was returned to Sing Sing Prison, where he had been serving a sentence on a state charge (Pet. App. 54). On July 12, 1962, the psychiatrist of Sing Sing recommended that the prisoner be committed to Dannemora State Hospital, diagnosing the prisoner's condition as "Schizophrenia, paranoid type".[3] Pursuant to this recommendation, Salvatore was examined by two physicians, who stated that in their opinion he was insane and a proper subject for custody and treatment at this institution (App. 193a). A judge of the county court made the commitment (App.

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[3] The doctor gave as his reasons for this conclusion (App. 190a):

> The inmate has a history of recent suicidal attempts by hanging and inflicting lacerations on himself (multiple scars on both forearms). He is depressed, crying, despondent over the fact that "the fellows at the trial are out to get me here, too". He has not eaten because the food is poisoned, "they" put needles and bamboo sticks in his food. He is suspicious of everybody here, always in fear that "they" would harm him. While in the hospital at the Federal Detention House he saw a mark on the ceiling, he climbed up the wall to observe it closer and saw God's face. He, therefore, felt prote[c]ted. The fellows came twice to get him but he defended himself by throwing chairs at them. He is likely to injure himself if precautionary measures are not taken.

For discussion of the "recent suicidal attempts" and chair throwing, see *United States* v. *Bentvena*, *supra*, 319 F. 2d at 930.

196a-197a). This diagnosis and commitment was communicated to the court of appeals by petitioners' present counsel on the appeal by Salvatore Panico of his conviction for contempt of court. *United States* v. *Panico*, 308 F. 2d 125, 129 (C.A. 2), reversed 375 U.S. 29.[4]

On petitions for certiorari to review the 1962 narcotics convictions, both Carmine Panico, represented by his present counsel (Pet. of Carmine Panico, No. 359, O.T., 1963, p. 17), and co-defendant Mirra (Pet. of Anthony Mirra, No. 705 Misc., O.T., 1963, p. 26) referred to this diagnosis and commitment. In reply to the latter, the government stated in its Memorandum in Opposition, p. 3:

> Petitioner makes much of the fact that, after his conviction, [Salvatore] Panico was committed to a hospital for insane persons in New York (Pet. 26). This is not the place to resolve the question of Panico's sanity. However, in light of the references, by this petitioner and others, to the New York commitment, we think it appropriate to advise the Court that the diagnosis of schizophrenia was tentative; that, on fuller examination, the New York authorities have concluded that schizophrenia was not a correct diagnosis; and that Panico was, on September 17, 1963, found suitable for return to prison.

To this was appended a footnote, reading as follows:

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[4] In reversing the conviction of Salvatore for contempt this Court noted the diagnosis of schizophrenia and the commitment to a state mental hospital. *Panico* v. *United States*, 375 U.S. 29, 30.

> In view of continued treatment of Panico's transfer as a conclusive finding of his insanity, we are lodging with the Court the following: (1) Proceedings in the matter of the commitment to Dannemora State Hospital of Salvatore Panico, # 129-446, an alleged insane prisoner; and (2) Dannemora State Hospital Clinical Summary of Salvatore Panico.

The substance of the documents which the government lodged with the Court was that Salvatore Panico was admitted to Dannemora Hospital on August 22, 1962, from Sing Sing, where he was serving a sentence for burglary. His family and personal history were negative for mental or nervous disorders (Pet. App. 54-57). The onset of mental illness and recent suicidal attempts were described in the language used by the psychiatrist at Sing Sing, set forth *supra* at page 4, n. 3. Because of the suicidal attempts, the patient was placed in a restraint sheet. During an interview, he said that there was poison in his food, that the fellows were after him; and that he did not know whether he saw God's face or not. Because of his uncooperative attitude, the examination was discontinued (Pet. App. 57). The patient was placed on tranquilizers. He showed progressive improvement and became very anxious to return to the prison (Pet. App. 58). On September 17, 1963, his condition and the recommendation of the hospital were stated as follows (Pet. App. 60-61):

> He has responded to medication and this was discontinued on July 5, 1963. He is in good contact, he shows no evidence of any symptoms

suggesting Schizophrenia which was the original impression. Today at Staff his ward physician as well as the Staff and psychologists, whom he had in group therapy and recently gave psychological test, which failed to reveal any evidence of Schizophrenia, expressed the idea that the patient has Psychopathic Personality and has not seen any evidence of Schizophrenia. Accordingly, the patient's diagnosis is changed from Schizophrenia, Paranoid to Psychosis with Psychopathic Personality, Depressed Episode. The patient has recovered and is found suitable for return to prison.

DIAGNOSIS: PSYCHOSIS WITH PSYCHOPATHIC PERSONALITY, DEPRESSED EPISODE

CONDITION: RECOVERED FROM PSYCHOSIS

RECOMMENDATION: RETURN TO GREEN HAVEN PRISON

No response was made to the government's memorandum or to the medical records thus lodged with the Court on November 21, 1963. On December 9, 1963, all petitions for certiorari in the case were denied (375 U.S. 940).

On May 5, 1965, Mr. Harris B. Steinberg, attorney for DiPietro on his appeal and petition for certiorari, wrote the Solicitor General that Mr. Abraham Glasser had communicated information indicating the possibility that the Court had been misled in its appraisal of the sanity of Salvatore Panico by statements in the government's brief and because of the illegibility of certain photocopies (Pet. App. 77-80). On May 11, 1965, Mr. Glasser also wrote to the So-

licitor General, offering his cooperation, as the person who had "dug up" this information (Pet. App. 80-81). The Solicitor General answered both communications promptly. He stated that the question of Salvatore Panico's mental condition at Dannemora, if relevant at all, was at best peripheral in these cases.[5] The government summary, he said, seemed to have been correct. The clinical summary lodged with the Clerk was readily legible. A Xerox copy of the document itself was enclosed for counsel's examination (Pet. App. 83-84). No further correspondence ensued and no action was taken for a period of almost three years, when the present motion was filed.

(2) Petitioner also submitted, in connection with their present motion, the affidavit of Dr. Jay Katz. After stating an impressive professional background, the affiant recounted the documents made available to him—extensive portions of the trial transcript, briefs of counsel, all of the papers in the certiorari proceeding following Salvatore Panico's contempt conviction, the Dannemora State Hospital proceedings, and correspondence. Dr. Katz had held several conferences with Mr. Glasser. Following interviews, psychological examinations and tests of Salvatore Panico conducted by him and his assistant, Dr. Prelinger, he was of opinion that Panico was not malingering during the 1962 trial. Panico's behavior

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[5] Salvatore Panico was not a petitioner, his conviction having been reversed and the cause as to him remanded by the court of appeals. *United States* v. *Bentvena*, *supra*, 319 F. 2d at 942-944.

"was at least akin to that of psychotic persons with paranoid tendencies and with marked potential towards aggressive action engendered by convictions and fright of unjust persecution so profound and overmastering as to throw him helplessly into episodes of senseless and violent behaviour beyond his control". Panico "felt that he was falsely accused of a narcotics conspiracy and as the trial progressed he became convinced that he was framed not only by the witnesses who testified against him but also by the Government and Judge." While neither Dr. Katz nor Dr. Prelinger found any current evidence of a schizophrenic disorder, they would instead describe Salvatore's condition as a severe character disorder and would liken some of his behavior in the courtroom to that of psychotic persons. Since the physicians at Dannemora had diagnosed his case as "psychosis with psychopathic personality, depressed episode", he would like "to review the clinical records of the hospital in order to determine whether at that time he [Panico] might have been so regressed as to actually have been in a psychotic state." In his opinion, there was "a serious question of Mr. Panico's own competence to stand trial at the operative times in 1962, particularly in view of his paranoid inability (or paranoid unwillingness) to cooperate with his own trial counsel" (Pet. App. 85-94).

The trial judge denied the motion to vacate without a hearing. In so doing, the court said (Pet. App. 36):

> Cutting through the clutter of distortions, half-truths, opinions, conclusions and sophistical ar-

> guments presented in petitioners' voluminous papers, the material question on this application is not whether Salvatore was sane or insane during trial but whether his conduct deprived petitioners of a fair trial. The focus of this inquiry is, thus, not on the cause of Salvatore's misconduct, but on its effect upon petitioners' rights. * * *

The court found that the supporting papers on the motion to vacate failed to present new evidence, inasmuch as the medical records submitted had already been considered and the proffered testimony of Dr. Katz was merely cumulative of evidence received during the trial (Pet. App. 41-50). The basic issue —which was whether petitioners had received a fair trial—had already been decided on direct review (Pet. App. 37-41, 49-50). Judge McMahon also denied the motion that he disqualify himself, noting that one of the principal reasons for enacting Section 2255 was to enable the sentencing judge to pass upon the contentions, on the basis of his personal knowledge gained through trial of the case (Pet. App. 50-51). In affirming, the court of appeals used similar reasoning (Pet. App. 1-12).

ARGUMENT

1. As both courts below found, the present motion is merely an attempt to reargue an issue long since resolved against petitioners. The files and records of the case show that their proffered "new" evidence has neither significance nor novelty. On direct appeal from the conviction, the court of appeals gave

minute attention to the various acts of disrespect and violence by the different defendants, including Salvatore Panico, and the steps taken by the court to admonish the jury to disregard them and to determine guilt or innocence of each defendant solely on the basis of the evidence relating thereto. Its conclusion was that petitioners received a fair trial and that the evidence supported their conviction. *United States* v. *Bentvena*, 319 F. 2d 916, 926-933, 944 (C.A. 2), certiorari denied *sub nom. Ormento* v. *United States*, 375 U.S. 940. The fairness of the trial of petitioners does not depend upon whether Salvatore's insanity was real or feigned, or whether he was competent or incompetent to stand trial. The question is whether his acts, however prompted, deprived them of a fair trial. In the absence of exceptional circumstances, not here presented, the determination that petitioners received a fair trial is not subject to reconsideration on collateral attack. See, *e.g.*, *Dranow* v. *United States*, 407 F. 2d 47 (C.A. 8); *Jackson* v. *United States*, 394 F. 2d 114 (C.A. 5); *Baca* v. *United States*, 383 F. 2d 154 (C.A. 10), certiorari denied, 390 U.S. 929; *Genovese* v. *United States*, 378 F. 2d 748 (C.A. 2).

The charges of bad faith on the part of the government (Pet. 35-38, 43, 48) are unsupported by the facts. The medical records of Salvatore Panico (Pet. App. 54-76) were lodged with the Court. The exact nature of the final diagnosis at Dannemora, which seems to be the crux of petitioners' complaint, appeared in large capital letters which could not con-

ceivably have been misread.[6] Even assuming that counsel were unaware of the nature of the final proceedings at Dannemora, despite the fact that the government had lodged a copy with the Court and had briefly but accurately stated its substance, counsel admittedly knew of them in the spring of 1965, but took no action until three years later.

The claim that the courts below misapprehended the nature of the Dannemora Clinical Summary (Pet. 39, 41) is also without foundation. The district court noted the full language of the diagnosis (Pet. App. 48, n. 47). The fact that it, as well as the court of appeals, at other points followed the equally appropriate language of the Summary, using the adjective "psychopathic" (Pet. App. 8, 42, 47), is of no significance.

The affidavit of Dr. Katz is, as the courts below have pointed out, merely cumulative, and weaker than the testimony given on behalf of Salvatore Panico at trial (see App. 85a-94a). The doctor's opinion that this defendant was not malingering, that he believed that he was being "framed", that he may have been incompetent to stand trial, that examination of his daily records might further assist the doctor in estimating his condition (*supra*, p. 9), even if true, lacks significance at this time. The question was the fairness of petitioners' trial, not

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[6] The copies lodged with the Court at that time are somewhat smudged, but can easily be read. Since these were only lodged with the Court, they were returned to the Department upon final disposition of these cases and by us returned to the United States Attorney. When the nature of these copies was subsequently brought into question in 1965, they were returned to the Department file at our request.

the mental condition of Salvatore Panico. That issue received close examination at trial and on direct review.

2. In view of the failure to present allegations which would require a hearing, it is academic to speculate whether Judge McMahon would "of necessity" have been a witness if a hearing had been held. One of the purposes of enacting Section 2255 was to permit the trial judge to pass upon the questions raised because of his familiarity with the proceedings. *United States* v. *Smith*, 337 F. 2d 49, 53 (C.A. 4), certiorari denied, 381 U.S. 916; *Mirra* v. *United States*, 379 F. 2d 782, 788 (C.A. 2), certiorari denied, 389 U.S. 1022. Especially in view of petitioners' failure at any time to show what they expected the judge's testimony to prove, there was no error in his refusal to disqualify himself. *United States* v. *Hughes*, 325 F. 2d 789, 792-793 (C.A. 2), certiorari denied, 377 U.S. 907. Petitioners specifically deny any contention that he was prejudiced (App. 10, fn.).

3. Petitioners raise here for the first time, but do not argue, the validity of the presumption of 21 U.S.C. 174 (Pet. 10, 50). That question is presently before the Court in *Turner* v. *United States*, No. 190, O.T., 1969. However, *Turner* is on *direct appeal;* in our view, there is no reason to defer ruling on the present claim, since the issue here is raised in a post-conviction proceeding under 28 U.S.C. 2255. As this Court pointed out in *Kaufman* v. *United States*, 394 U.S. 217, 229: "The availability of post-conviction relief serves significantly to secure the integrity of

proceedings at or before trial and on appeal. No such service is performed by extending rights retroactively." At the time of trial and appeal in this case the validity of the Section 174 inferences had been repeatedly upheld by the lower courts under the authority of *Yee Hem* v. *United States*, 268 U.S. 178. Even were this Court to find the inferences invalid in *Turner*, the reliance on prior settled law and the burden of retroactive application on the administration of justice would militate against affording relief under 28 U.S.C. 2255. See, *e.g.*, *Desist* v. *United States*, 394 U.S. 244; *Stovall* v. *Denno*, 388 U.S. 293, 297.

CONCLUSION

For the reasons stated, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1969.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 367575 283

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Supreme Court of the United States

OCTOBER TERM 1969

No. 694

CARMINE PANICO and CARLIE DiPIETRO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Joint Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' JOINT REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

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I

We noted in our petition for certiorari herein, *passim*, that until this case reached its present stage of a §2255 post-conviction review effort by the present petitioners, everyone on the Government's side of this 1962 narcotics

prosecution, as well as the trial Judge and the Court of Appeals Judges in the direct review proceedings in 1962-63 were perfectly content to let the narcotics convictions rest on the then adjudicated finding that Salvatore Panico's sensational misconduct in the 1962 trial was not caused by any uncontrollable psychological condition.

Our petition for certiorari herein also points out that in both of the Courts below, in this §2255 proceeding, the Government's lawyers and the Judges apparently had no difficulty in switching from the original 1962-1963 theory that Salvatore Panico was conspiratorially faking insanity, to the new (second-thought) theory that after all it does not matter whether Salvatore was actually crazy or not, because even if he was actually every bit as insanely helpless to control himself in the 1962 trial as the co-defendants were claiming he was at that time and in the subsequent direct review proceeding, it would not have made any difference in deciding the 1962-1963 issue of prejudice caused to Salvatore's co-defendants by Salvatore's insane behavior, since all that counts is whether the trial Judge adequately cautioned the jury for the protection of the co-defendants in regard to Salvatore's mad acts.

Now, in the Brief In Opposition herein, the Solicitor General's office has lent its prestige to this metamorphosed strategy of the prosecution and of the Courts below for the salvaging of these narcotics convictions. Thus, at p. 11 (Br. In Opp.) it is stated, "The fairness of the trial of petitioners does not depend upon whether Salvatore's insanity was real or feigned, or whether he was competent or incompetent to stand trial. The question is whether his acts, however prompted, deprived them of a fair trial." Again, at pp. 12-13 (*ibid.*) it is stated, "The question was the fairness of petitioners' trial, not the mental condition of Salvatore Panico."

Judges and lawyers pass their working lives in a professional environment where the proper modes of discourse include resort to formulation of "alternative" positions of reasoning or argument. But in this present case of Panico and DiPietro one cannot but feel surprised at the *extreme* to which the "alternative" technique has now been carried by Government counsel and by the Courts below.

For, in the *abruptly new switch-over* "alternative" argumentation and reasoning, respectively, of the Government lawyers and of the Courts below in this §2255 case, we are being told in effect—for the first time in this eight-year old case—(1) that Salvatore Panico was not a helplessly uncontrollable maniac, *and/or* (2) that it does not matter if he was because this particular (alternatively-assumedly) helplessly uncontrollable maniac was in a conspiratorial plot with the co-defendants to make believe that he was a maniac for the purpose of wrecking the trial.

Paraphrasing words spoken five score and two years ago by a man imbued with the sense of history: "The world will little note nor long remember" a denial of certiorari in this case to Carmine Panico and Carlie DiPietro; but "it will never forget"—unless future historians of due process and of the federal criminal prosecutive decencies fail in their task—what Government counsel and the Courts below have done in this case in their egregious utilization of the "alternative" formulary techniques of our profession.

II

Also distressing is the Solicitor General's resort to an argument suggesting some sort of laches on our part in raising the question of the accuracy of the Government's

1963 presentation to this Court concerning Salvatore Panico's final Dannemora diagnosis. At p. 12, Br. In Opp., it is stated, "Even assuming that counsel were unaware of the nature of the final proceedings at Dannemora, despite the fact that the Government had lodged a copy with the Court and had briefly but accurately stated its substance, counsel admittedly knew of them in the spring of 1965, but took no action until three years later."

First, we are obliged to ask, in all respectful protest, what does the Government mean when it uses the above quoted words "Even assuming that counsel were unaware", etc.? Does the Government mean that despite our (undersigned counsels') unequivocal assurances to the Courts below and to this Court (Pet. Cert., pp. 25-26, and see especially the first footnote on p. 26; pp. 33-38, and see especially pp. 36-38; p. 41; p. 43), there persists some doubt as to our (undersigned counsels') truthfulness in thus having assured this Court, on our professional honor, that we absolutely knew nothing about the *actual contents* of the Dannemora Clinical Summary until about ten days after Mr. Glasser's telephone call to the Clerk of this Court on December 24, 1963 (see Pet. Cert., pp. 36-38)?*

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* The writer of the Brief In Opposition herein was apparently willing to impugn our (undersigned counsels') good faith as to our assurance that we never saw the Dannemora Clinical Summary until about ten days after Mr. Glasser's telephone conversation with the Clerk on December 24, 1963, yet said writer of the Brief In Opposition has apparently seen fit to "avoid like the plague" our detailed factual account to this Court as to how and when we first got knowledge of the *actual contents* of the Dannemora Clinical Summary as distinct from the Government's misleading description of that paper to this Court in the 1963 certiorari proceedings (see, again, Pet. Cert. herein, pp. 36-38).

Second, we reply as follows to the suggestion in the Brief In Opposition (p. 12) that our clients, the petitioners Panico and DiPietro, should now suffer because "counsel admittedly knew of [the contents of the Dannemora papers] in the spring of 1965, but took no action until three years later":

It has remained for the writer of the within Brief In Opposition to invoke this unfortunate argument in the nature of laches. In the Courts below neither the Government nor any of the Judges invoked against us any such unworthy contention of laches. True, one expects the office of the Solicitor General of the United States, when Government cases reach Supreme Court level, to "find something" that may have been "missed" in the prior handling of the case. But in this instance the Solicitor General's argument in the nature of laches is *refuted by the record,* which apparently was perceived by Government counsel and by the Judges in the Courts below, but apparently did not come to the attention of the writer of the Brief In Opposition herein. We quote from the §2255 affidavit of counsel (Jerome Lewis, affidavit sworn to April 16, 1968), appearing in the record herein at A66a-A68a, A76a-A79a:

> "I have now carried these chronological recitals down to June 13, 1963, the date of the Court of Appeals' affirmance of the narcotics convictions of Carmine Panico and Carlie DiPietro, which was some eleven months after their and Salvatore's narcotics conviction and the practically immediately ensuing State findings that Salvatore was schizophrenic.
>
> "It now becomes pertinent to make the following chronologically relevant averments: It will be re-

called that Salvatore had gone into the limbo of Dannemora as an adjudicated schizophrenic on August 22, 1962, his brother Carmine meanwhile remaining incarcerated serving his narcotics sentence. The Panico brothers' immediate family relatives, represented by another brother, were meanwhile being my 'contact' with the respective situations of Salvatore and Carmine. But this 'contact' was handicapped by those all too usual and familiar circumstances which one encounters when dealing with close family relatives of persons who have suffered life catastrophes of the kind which was here involved in the cases of Salvatore and Carmine Panico during the period of which I am now speaking (mid-1962 to mid-1963). All that I knew, and apparently all that the Panicos' relatives knew, about Salvatore during the period in question was that he was continuing to undergo confinement and treatment as an insane person at Dannemora.* Besides, Salvatore's within narcotics conviction having been reversed by the Court of Appeals, and his tragic lodgment at Dannemora appearing to be irretrievable at least *pro tem* so far as we then knew, it was natural (I submit) that my own primary attention should be focused on Carmine's case during the period in question. All in all, the fact is, and I so aver, that I literally had no information about Salvatore's condition or progress at Dannemora during the period in question (mid-1962 to mid-1963) other than that he was there under confine-

* "Salvatore's New York State confinement, incidentally, was under a then still operative State Prison sentence for a crime not connected with the within Federal narcotics case."

ment and treatment as an insane person. Today, I do at last know much more of what was happening to Salvatore during that time, and I shall speak of this at an appropriate place *infra.*

"After the Court of Appeals affirmed the narcotics conviction as to DiPietro and Carmine Panico (June 13, 1963), my own tasks (and the tasks of my colleague Mr. Glasser) in regard to the Panico brothers consisted of awaiting the action of the Supreme Court on the certiorari application in Salvatore's contempt case, and prosecuting the certiorari application in Carmine's narcotic case. As regards both of these tasks, neither I nor Mr. Glasser knew anything more (as I above indicated) concerning Salvatore's psychiatric status than we had known from the July-August 1962 State documents previously described and from our general knowledge that Salvatore remained in confinement at Dannemora Prison Hospital.

* * *

"After the above described happenings of December 1963-January 1964 [our discovery of the actual contents of the Dannemora Clinical Summary] Mr. Glasser and I advised counsel for other defendants of what we had found in relation to the prison-medical records. But by this time, with all of the defendants in jail, we (as counsel) found ourselves severely handicapped in taking any further steps. More than a year then passed, and at length in May 1965, acting on the information above described, Harris B. Steinberg, Esq. who had represented DiPietro in the appeal and certiorari proceedings, wrote to Solicitor General Archibald

Cox setting forth that information and asking for appropriate action by the Solicitor General. In Exhibit E hereto, *infra,* I annex photocopies of Mr. Steinberg's letter to Mr. Cox (May 5, 1965), a companion letter from Mr. Glasser to Mr. Cox (May 11, 1965), and Mr. Cox's reply to Mr. Glasser (June 1, 1965) enclosing a copy of Mr. Cox's reply to Mr. Steinberg (May 28, 1965). Mr. Cox did not find that 'the Court was in any way misled or failed to understand the issues before it" (see Cox letter to Steinberg, *supra,* May 28, 1965, Exhibit E hereto, *infra*).

"That was nearly three years ago. For all of the understandable reasons which handicappingly attend a matter of this kind, where the clients are accounted by all the world as being 'as good as dead' under long prison sentences, this §2255 case has lagged. It may be of interest to the Court for me to mention some of the compounding factors which have prolonged the lag in this case. Salvatore Panico was not released from the New York State prison until somewhat over a year ago, I am informed; and, as the affidavit of Dr. Katz filed herewith indicates, it has been important for us to have Salvatore available for psychiatric interviews under optimum conditions, so that one factor was that we were waiting for Salvatore's release from State Prison. Another factor was that the psychiatric consultant whom we wanted to engage before we found the eminent Dr. Katz, was Dr. Weiss, who had examined Salvatore for the defense in 1962 (*supra*); and for a long time in 1965-1966 we were unable to locate Dr. Weiss, who had moved (to Pennsylvania as we later learned); then,

in the Spring of 1966 we at last located Dr. Weiss as he had meanwhile returned to New York City, to the psychiatric staff of the Kings County Hospital; we then promptly retained Dr. Weiss (around May or June 1966), and we paid him a retainer fee; then about three weeks went by during which we heard nothing from Dr. Weiss, whereupon we telephoned his office at the Kings County Hospital and were told that he had died on the day after we had retained and paid him. We then embarked upon an intensive, nation-wide search for a 'top', qualified psychiatrist specializing in criminology. In instance after instance we ran into the problem that such psychiatrists receive financial grants from either Federal or State governmental programs by reason of which they deem themselves disqualified to counsel or testify for defendants in criminal cases. But in the course of this search we also found that, likewise in instance after instance, the psychiatrists whom we canvassed kept recommending, as the 'top man' in the field, Dr. Jay Katz of the Yale Medical School and Law School faculties. As may readily be imagined, a scientist of the stature of Dr. Katz is a very busy man indeed, and throughout the last months of 1966 we worked at setting up a schedule with Dr. Katz, whom we had at last been fortunate enough to engage. It was decided that it would be best for Dr. Katz to defer interviewing Salvatore Panico until the latter got out of State prison, and could sufficiently stabilize his personal life as well as his relations with the Federal law enforcement authorities, to be able to travel to New Haven, Connecticut for psychiatric interviews with Dr. Katz. It was at last possible to set up a schedule of inter-

views of Salvatore by Dr. Katz for December 1966-January 1967, after Dr. Katz had had opportunity to study the pertinent legal records. Dr. Katz gave us a preliminary report in February 1967. Several intensive conferences then followed, spaced over a period of months in deference to Dr. Katz's schedule. We were not able to get Dr. Katz's report in final affidavit form until March of this year [1968] (said affidavit is filed herewith). My own present affidavit, and those of the movants Carmine Panico and Carlie DiPietro filed herewith, were being readied in the meantime. The real sufferers in this unfortunately long-delayed completion of the present Section 2255 application have been DiPietro and Carmine Panico, but in reciting the above facts I have felt that an explanation for this delay is owed also to the Court and the Government; to which I should add that some of the delay has been caused also by the work load of counsel in other matters, especially the work-load of my colleague Mr. Glasser who, I think the Government knows, is an exceptionally hard-working attorney afflicted with closely-spaced 'deadline' problems."

III

The Government has not (evidently because it cannot) given any effective reply to our description of the serious factual errors in the opinions of both of the Courts below concerning the contents of the Dannemora Clinical Summary and other matters (Pet. Cert., pp. 39-41).

1. Answering our demonstration that both of the Courts below saw fit to leave out the all-important word "psychosis" when they quoted the final Dannemora diagnosis,

the Government states only that the District Court did note the full language of the diagnosis in a footnote to its opinion (Br. In Opp., p. 12), and that both of the Courts below, in elsewhere using only the adjective "psychopathic" did something which "is of no significance" (*ibid.*)—this latter astounding contention of the Government that the difference between "psychosis" and "psychopathic" has "no significance" being not further elaborated in the Brief In Opposition. That the District Court in a footnote to its opinion (Pet. App. 48a, n. 47) quoted the full text of the Dannemora document is hardly convincing to negate the wish-motivated state of mind of the District Judge in view of the fact that in two other places in the District Court's opinion, where that Court was giving written expression to its own understanding of the Dannemora document, it saw fit to refer to the final diagnosis without mention whatsoever of the all-important word "psychosis" (Pet. App. 42a, n. 35, 47a).*

As to the failure of the Court of Appeals to perceive, or even to mention, the all-important medical terminology and medical factor of the word "psychosis" in the final Dannemora report, the Brief In Opposition offers nothing

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* In fairness we note that in still another place in its opinion (Pet. App. 47a, n. 44), the District Court did use the word "psychosis", in addition to the place cited by the Government (Br. In Opp. pp. 12). However, this very conduct of the District Court in indiscriminately, or haphazardly as it were, noting and failing to note the word "psychosis", and especially its omission of that word at the single most significant place in its opinion where it quoted the final Dannemora diagnosis *in capital letters* (Pet. App. 47a), negate the Government's argument that the District Court did actually perceive with proper judicial open-mindedness the factor of *psychosis* in the language of the final Dannemora report.

except the above noted merely conclusory suggestion that this "is of no significance" in evaluating the soundness of the opinion of the Court of Appeals or of its grasp of the real issues of this case (Br. In Opp., p. 12).

2. As to the factual error of the Court of Appeals to the effect that Carmine Panico and Carlie DiPietro had been held in contempt at the first trial of this indictment, before Judge Levet (Pet. Cert., pp. 39-40), the Brief In Opposition is silent. As we suggested at p. 40, Pet. Cert. "This serious error of fact in the Court of Appeals' opinion herein is significant because it indicates the mode of unsatisfactory thinking in what appears to have become a judicial "folklore" attitude among the lower Courts in this case in support of the theory that Carmine Panico and Carlie DiPietro were in a plot with Salvatore to wreck the trial."

3. The Brief In Opposition is likewise silent concerning the Court of Appeals' error in stating that Salvatore Panico at the inception of his outbursts during the 1962 trial was being represented by assigned counsel "who had represented him very capably during the first trial" (Pet. Cert., p. 40). As we stated in our petition for certiorari herein (*ibid.*), "This factual error of the Court of Appeals is another instance of the slippage of factual accuracy on the part of the lower Courts in this case, as they apparently strive for excuses or rationalizations to justify their belief (*never tested in an evidentiary hearing*) that Salvatore's misbehavior was part of a plot to wreck the trial."

4. Nor does the Brief In Opposition reply to our showing (Pet. Cert., p. 41) that the Court of Appeals again factually erred in stating that after Salvatore Panico was gagged and shackled, following his climactic outburst in

the 1962 trial (rushing into the jury box, etc.), "no further incident occurred during the remainder of the trial". As we noted in our petition for certiorari herein (*ibid.*), "This factual error of the Court of Appeals apparently denotes, again, that Court's perhaps wishful thinking that Salvatore was faking his outbursts and that he "sanely" stopped them when firm measures were applied."

5. Above all, it is noteworthy, we submit, that the Brief In Opposition is silent concerning our demonstration at Pet. Cert., p. 41 of what we termed "perhaps the most serious factual error of the Court of Appeals". This item is of sufficient importance we believe—and the Government's apparently studious effort to avoid coming to grips with this item encourages our emphasis—to justify our repeating in this reply brief the passage in question from p. 41, Pet. Cert.:

> "Perhaps the most serious factual error of the Court of Appeals is at p. 9a (Appendix A hereto, *infra*), where, referring to the final Dannemora diagnosis of September 1963 (which the Court of Appeals, at p. 8a, *infra,* misquotes, as above noted, by leaving out the word 'psychosis'), the Court inexplicably states that this Dannemora information of September 1963 'cannot be really considered new because this information was submitted to this Court on direct appeal of the conviction, it was argued by both sides as fact and was considered by us in reaching our decision'. How could the Dannemora medical information of *September 1963*, which did not even become known to anyone until late *November or early December 1963* when the Solicitor General produced it in this Court, how could this information of *September-December 1963*

have been before the Court of Appeals, where Salvatore's contempt conviction was affirmed in *September 1962*, the narcotics appeals were argued in *January 1963*, and those appeals were decided in *June 1963*? This factual error of the Court of Appeals, in which that Court *imagines* it knew all about Salvatore's final Dannemora medical history during the 1962-1963 appeals, is hard to reconcile with any supposition that the Court of Appeals fully mastered the factual record in this §2255 proceeding."

IV

We stated in the petition for certiorari herein (pp. 5, Question 2; and 48 n.) that we would be following up this petition for certiorari with a motion for leave to file, out of time, a petition for rehearing of the denial of certiorari in this case at the October 1963 Term (375 U. S. 940), on the ground of the Solicitor General's indicatedly incorrect presentation to this Court in those 1963 certiorari proceedings concerning Salvatore Panico's final psychiatric diagnosis at Dannemora. After further consideration we (undersigned counsel) have decided that, in our clients' best interests, any such further steps aimed at reviving the 1963 certiorari proceedings should not be taken at this particular juncture; and we respectfully reserve our right, if any, to take such step at another time. We also respectfully adhere to the suggestion in our Question 2 (Pet. Cert., p. 5) that this Court should grant such rehearing *sua sponte* on our within certiorari papers, as an alternative to the granting of certiorari in this §2255 proceeding.

CONCLUSION

It is respectfully submitted that this joint petition for a writ of certiorari should be granted.

December 19, 1969.

Respectfully submitted,

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